

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 SUPERIOR COURT
 YAVAPAI COUNTY, ARIZONA
 FOR THE COUNTY OF YAVAPAI

2011 DEC -6 AM 9:58

SANDRA K MARKHAM, CLERK

Jacqueline Markham

STATE OF ARIZONA,)

Plaintiff,)

vs.)

Case No. V1300CR201080049

JAMES ARTHUR RAY,)

Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-SEVEN

JUNE 16, 2011

Camp Verde, Arizona

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
3

4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) Case No. V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant.)
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1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Thursday,
3 June 16, 2011, at Yavapai County Superior Court,
4 Division Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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1 P R O C E E D I N G S

2 THE COURT: The record will show the presence
3 of Mr. Ray and the attorneys.

4 I've asked to see the attorneys, but
5 they've also asked to see me. And I'm going to
6 bring up something that I am concerned with after
7 listening to the start of the state's opening, but
8 not just in regard to that, but just upon
9 reflection. And I want to hear Mr. Hughes
10 specifically on this matter.

11 I think the instruction with regard to
12 knowingly was not appropriate -- was not
13 appropriate for the jury to have that instruction.
14 And the only way it would have been appropriate is
15 if the state had actual evidence of knowingly.

16 And, Mr. Hughes, I don't think you've
17 ever asserted that you were asserting evidence of
18 knowingly. Were you?

19 MR. HUGHES: Your Honor, I believe that there
20 is evidence of knowingly with respect to the
21 statements that were made within the sweat lodge
22 that the jury has heard evidence in the form of
23 testimony about statements regarding whether people
24 were breathing or not or in trouble or not.

25 Those statements, I believe, create the

1 impression -- take us to the threshold or beyond
2 the threshold to the knowing state of mind.

3 THE COURT: Knowing state of mind as to what?

4 MR. HUGHES: Your Honor, knowing that the
5 people inside could be dying or were dying. Again,
6 the standard in this case is not that Mr. Ray knew
7 that his conduct was killing someone but that it
8 could cause the death. And I believe that the
9 knowing state of mind is established on that
10 element based on the testimony that's come from the
11 other participants inside and also the people who
12 were outside the sweat lodge.

13 THE COURT: Because I -- because for the
14 reasons indicated, I do not think it's any kind of
15 a due process issue, and I've explained that. It
16 is a question of whether or not there is evidence
17 sufficient to go so that pertaining to an element,
18 a jury has evidence of that -- that level.

19 Otherwise it would enter into the --
20 present the type of problems that Mr. Kelly had
21 really been talking about, which is somehow
22 suggesting that there was this evidence there. And
23 if there is, then it's an appropriate instruction.
24 If there is arguably that evidence that there was
25 knowing with regard to the elements, not as to

1 other subsidiary aspects of the case.

2 And the word "intent" gets used in the
3 common-sense meaning. And that was also discussed
4 by the defense. But that's another thing to talk
5 about, the common-sense meaning of such things as
6 intent and knowing.

7 Another thing to present an instruction
8 which through the Court implies there is evidence
9 out there that you can find this level of mental
10 state.

11 Mr. Kelly.

12 MR. KELLY: Judge, I would just again
13 emphasize again objection to presenting the jury
14 with a definition of "culpable mental state." That
15 is not applicable in this case. And as you have
16 just emphasized, that there is no reasonable
17 inference from the facts presented during the
18 four-month time period.

19 I'm looking at the definition of
20 "knowing." And you correctly recalled that it
21 means the defendant acted with awareness of or
22 belief in the existence of conduct, which is an act
23 or an omission in this case, or circumstances
24 constituting an offense.

25 And, of course, manslaughter in the jury

1 instructions say that he acted with -- knowingly
2 acted with an awareness that he was going to cause
3 the death of another person -- I've heard no
4 evidence of that -- and that Mr. Ray was aware
5 of -- knowingly aware of and showed a conscious
6 disregard of a substantial and unjustifiable risk
7 of death.

8 I've just never -- I don't even know how
9 to articulate this. I've never been involved in a
10 homicide case where there is no intent and the
11 person is not acting knowingly, so the issue for
12 the jury to decide is this reckless state that
13 we've argued. And without a factual predicate,
14 they're instructed.

15 What's so damaging is, I recall
16 Ms. Polk's opening when she kept emphasizing
17 intent. And she said something to the effect that
18 Mr. Ray intended to subject them to intense heat in
19 a confined environment. And jurors are not -- they
20 do not have the benefit of a legal education or
21 legal experience to make these fine-line
22 distinctions and can be often misled.

23 So, Judge, again, we renew our objection
24 to this mental state and do not believe it's
25 applicable. We'd ask that it be cured somehow at

1 this point in time and ask that the government be
2 careful in the use of terms when it's asserting a
3 reasonable inference from facts presented during
4 trial.

5 THE COURT: It is the Court's analogy, and I
6 qualified it when I made it, it would not apply,
7 giving other standards so that something can be
8 given a frame of reference. I mentioned a contest.
9 That's not an appropriate analysis.

10 The one part of the testimony that came
11 somewhat close and arguably, I think, would be
12 knowing had -- was Fawn Foster's. And that was the
13 subject of some redirect and that about whether --
14 it was a question of whether breathing or
15 unconscious, which is a major difference. But this
16 isn't a small matter. This is not a small matter.

17 And are you saying, Mr. Hughes, that you
18 did -- you say you have produced evidence -- you've
19 presented evidence that showed knowingly causing
20 death, causing death. And under the definition "of
21 knowingly," that was the result that was known to
22 happen.

23 MR. HUGHES: Your Honor, I believe the state
24 has. If the jury decides to accept what Ms. Foster
25 originally testified that she heard and if the jury

1 accepts what they've heard the other participants
2 said that they heard inside both from people
3 expressing problems and to Mr. Ray's responses of,
4 well, leave them there, we'll deal with them the
5 next round, or they'll be fine.

6 If the jury believes that Mr. Ray was
7 told that someone was not breathing and he
8 continued his conduct, continued bringing heat and
9 the humidity into sweat lodge and said, leave them
10 be, we believe that that -- that a reasonable juror
11 could find that he was acting knowingly in that
12 situation because the only result that can occur if
13 you leave somebody not breathing is death.

14 THE COURT: Was that ever the ultimate
15 testimony, though --

16 MR. HUGHES: Your Honor --

17 THE COURT: -- with regard to Ms. Foster? I
18 thought that that was actually retracted
19 essentially and --

20 MR. HUGHES: I don't believe --

21 THE COURT: -- it was only -- and there is a
22 difference.

23 MR. HUGHES: I don't believe it was retracted.
24 What she did say later on was on additional
25 questioning, she clarified at that point when she

1 was being questioned again, she couldn't remember
2 if it was -- the comment was the person is not
3 breathing or the person is unconscious. And at
4 that point in time when she was requested, she
5 said she couldn't remember.

6 The jury did hear, though, the original
7 testimony about what she said that she heard and
8 the fact that she was very, very, very emotionally
9 affected by what she heard originally. And I think
10 that evidence is sufficient for the jury to weigh
11 and make it's own conclusion as to what Ms. Foster
12 heard.

13 Certainly I believe on cross-examination
14 the defense was able to get Ms. Foster to say, I
15 don't know. Or maybe it was even Ms. Polk in later
16 questioning got Ms. Foster to say, I don't know at
17 this point whether it was not breathing or
18 unconscious. But the fact of the testimony is
19 still there. It's sufficient for a jury to reach
20 that conclusion. The jury may not. They may
21 reject it. But if they do want to reach that
22 conclusion, they need to have the instruction.

23 MS. POLK: And, Your Honor, if I can jump in
24 here?

25 THE COURT: Yes.

1 MS. POLK: Thank you.

2 There are two other witnesses who also
3 testified about hearing a comment about not
4 breathing. And that was Laurie Gennari, who
5 testified that she heard a voice call out from the
6 1:00 to 2:00 o'clock position, she's not
7 responding, and another time, she's not breathing.

8 And she testified to the response by
9 Mr. Ray. And then Dr. Beverly Bunn testified that
10 around Round 6 or 7, she heard a voice say, I can't
11 get her to -- someone is not breathing.

12 So in addition to the testimony from Fawn
13 Foster, the jury also heard two other witnesses
14 reference that comment about not breathing.

15 THE COURT: Mr. Kelly.

16 MR. KELLY: Judge, I don't believe that's the
17 testimony. And more importantly, I point out three
18 things:

19 The first is that the -- the State of
20 Arizona is only allowed to argue reasonable
21 inferences from the facts presented during trial.
22 That's the standard. It's been briefed. We
23 believe it's been breached. We've briefed it.
24 Clearly that is the standard of the Arizona law.

25 The second is this Court, the prosecutor,

1 the defense, and the jury should be using the same
2 standard to judge the credibility of witnesses. We
3 actually -- we actually instruct the jury in that
4 regard on page 2 as to what is credible testimony.

5 And it's disingenuous (sic) to take
6 someone like Fawn Foster and given the
7 circumstances surrounding her testimony and then
8 argue that that's a reasonable inference to argue a
9 mental state that is greater than that alleged in
10 the crime.

11 THE COURT: That argument -- I'm not
12 accepting, the due-process argument. If there is
13 evidence here and the state did present evidence
14 beyond what's alleged, for those reasons, I'm not
15 rethinking that at all.

16 If there is a -- if a charge -- if the
17 case is charged at the level of negligence but
18 there is testimony, if there is evidence that goes
19 to the jury of a higher mental state, then these
20 lesser included mental state instructions should be
21 there.

22 I mean, I understand you disagree with
23 that. But that's --

24 MR. KELLY: Well, let me -- let me try it this
25 way.

1 THE COURT: I've made the ruling.
 2 What's not appropriate, and I want to
 3 make this clear, is if there is not evidence of
 4 that mental state, to have it in there as some type
 5 of means to provide a comparison of mental states,
 6 that's not an appropriate purpose for that. It can
 7 only go in if there is evidence that would justify
 8 the jury in making that finding. That's the point.

9 MR. KELLY: Let me attempt to restate my
 10 point, Judge. And it is this: Why would the State
 11 of Arizona build error into a case? Using the
 12 standard upon which we're obligated to judge the
 13 credibility of witnesses as attorneys and that this
 14 jury is going to be obligated to, Judge, you have
 15 to stretch the boundaries so far, just like we
 16 heard in the response to your direct questions to
 17 try to establish the reasonable inference from
 18 these facts. Because these are not the facts that
 19 I remembered.

20 I recall objecting to leading questions,
 21 which were sustained, by Ms. Polk where the --
 22 where the wrong state of mind was asked in the
 23 question itself and had to be corrected. And I'm
 24 speaking of Fawn Foster.

25 And I've just been provided the

1 transcript. And the answer was, I heard James Ray
 2 say, are they breathing? And I did not hear the
 3 answer to that. And I heard James Ray say, leave
 4 them there. We have one more round.

5 And Ms. Seifter just handed this to me.
 6 I assume that's Fawn --

7 MS. SEIFTER: Yes.

8 MR. KELLY: That's her testimony under oath.
 9 So that points out your question to the state.

10 And my point is that we continually from
 11 the selection of the jury through today push the
 12 boundaries of what's an appropriate, fair,
 13 impartial presentation of facts and law and the
 14 due-process rights of my client.

15 And so what I was trying to point out is,
 16 Judge, this mental state, knowingly, is not even an
 17 element of the crime in this case. And I believe
 18 that it's just wrong --

19 THE COURT: That's not an argument that I'm --
 20 I find to be significant as a legal matter.

21 As I said, I'm not going to go through
 22 the example again.

23 MR. KELLY: Well, I --

24 THE COURT: I am not. If there were, in fact,
 25 facts to make that determination, then that's why

1 the instruction is there in part.

2 MR. KELLY: What I'm trying to say, Judge, is
 3 that the outcome of the case and the jury assessing
 4 the facts of the crime that they need to, the state
 5 needs to establish culpable mental state as
 6 alleged.

7 It begs the question why are they working
 8 so hard to get something that is not even an
 9 element of the crime? That's the point. I'm not
 10 rearguing what I did yesterday because it fits into
 11 this stretching of the facts and what is required
 12 as a reasonable inference from the facts
 13 continually by the state.

14 And I will mention and put on the record
 15 that yesterday as I was listening to the first part
 16 of Ms. Polk's opening, I wrote down 18 assignments
 17 of error. And I'm not going to ask for time right
 18 now to put them on the record. But many of them
 19 directly relate to the very jury instructions that
 20 I requested during the past two days and were
 21 denied by this Court, such as the vicarious
 22 liability instruction.

23 And Ms. Polk stood up with that chart and
 24 said, Mr. Kelly told -- tried to get you to believe
 25 that Mr. Ray is not responsible for the actions of

1 his corporation. Flat misstatement of the law.

2 THE COURT: Was that statement made, Ms. Polk?

3 MR. KELLY: I wrote it down, Judge.

4 THE COURT: If that statement was made --

5 MR. KELLY: And if I could just get the exact
 6 question. Mr. Kelly wants you to believe --
 7 looking at the chart that I drew, Mr. Kelly wants
 8 you to believe that Mr. Ray is not responsible for
 9 the conduct of JRI. That was the statement.

10 MS. POLK: Your Honor, that is not what I
 11 recall saying. That is not what I intended to say.
 12 My point was that Mr. Kelly drew that corporate
 13 diagram trying to remove the defendant from
 14 responsibility for what happened in the sweat
 15 lodge. And that's what was my intent in
 16 illustrating that and then comparing it to what
 17 Mr. Ray controlled in the sweat lodge.

18 THE COURT: The -- well, I know why the state
 19 was presenting that, I would think. And it has to
 20 do with arguments that deal with corporate
 21 responsibility versus defendant responsibility.
 22 And those arguments have been advanced by the
 23 defense.

24 The instruction provided went one way.
 25 The fact that someone acts -- and I read the two.

1 305 and 306, I think, were the ones provided. And
 2 the only way to put that in is to have all of
 3 them -- all of it there. And the state -- the
 4 defense was adamant, we don't want the other part
 5 in.

6 And -- well, in light of that, then,
 7 there are enough instructions there that the jury
 8 has to follow the instructions and only consider
 9 the conduct that relates to the defendant. That's
 10 it. Those instructions say that. And if it's not
 11 going to be a balanced instruction, then those are
 12 the instructions that apply. I don't want to go
 13 into anything else.

14 This -- this -- the knowingly standard
 15 should not have been given. It's not appropriate.
 16 How to remedy that is a difficult thing. It's
 17 nothing I've ever done in a trial, had a
 18 postcorrection.

19 What I'm going to do is, I've got a
 20 revised sheet I'm going to give to the parties to
 21 look at, and we can think mechanically. I can just
 22 say that there was an instruction given and there
 23 should be a correction and this page replaces it or
 24 something like that.

25 But the knowingly level of mental state

1 should not have been given, should not.

2 There is another legal issue.

3 Mr. Kelly.

4 MR. KELLY: Mr. Li.

5 THE COURT: Mr. Li.

6 MR. LI: Your Honor, this is just a --
 7 yesterday the Court had asked for us to provide --
 8 the Court gave an oral instruction about burden
 9 shifting and had asked us to provide a written
 10 suggestion. We have provided a written suggestion.
 11 It is exactly the same. Well, it's not exactly the
 12 same, but it's almost exactly the same. And it's
 13 patterned after the instruction this court gave on
 14 April 29th when the state inappropriately asked of
 15 Detective Diskin questions about when he learned
 16 about the organophosphates issue.

17 And this is the exact same issue that was
 18 raised through Ms. Polk's argument when she said,
 19 essentially, the same thing, which is that somehow
 20 the defense neglected to tell the prosecution about
 21 its own evidence.

22 This Court had cured that error -- or
 23 attempted to cure that error earlier on April 29th,
 24 and we'd ask for, essentially, the same
 25 instruction.

1 Does the Court have a copy?

2 THE COURT: Yeah, I do. I've seen it.

3 MR. LI: All right. I'm sorry.

4 THE COURT: No. That's all right. I'm sorry.

5 MR. LI: No. That's okay. I was just --

6 THE COURT: Ms. Polk, first of all, do you
 7 agree that -- or disagree that that's a correct
 8 statement of the law?

9 MS. POLK: I disagree with what Mr. Li said in
 10 a couple of areas. First of all, when that line of
 11 testimony was undertaken during the trial, the
 12 Court did not find it was error. The Court read a
 13 limiting instruction to remind the jury that the
 14 state has the burden of proof and the defendant
 15 does not have to come forward with any evidence.
 16 But there was no testimony that was stricken.

17 The record I made yesterday, and I'll
 18 just repeat again today, is that the defendants
 19 argued for and the Court gave the Willits
 20 instruction. And in that Willits instruction, it
 21 specifically says that if you find that the state
 22 has lost, destroyed, or failed to preserve
 23 evidence -- and, of course, the state contends that
 24 did not happen -- whose contents or quality are
 25 important to the issues in this case, that you

1 should weigh the explanation, if any, given for the
 2 loss or unavailability of the evidence.

3 This instructions allows the state to
 4 argue the explanation. The explanation came out
 5 through testimony in trial. At that time the Court
 6 gave a limiting instruction. Yesterday after the
 7 break, the Court gave a limiting instruction, and
 8 we should move on.

9 There is no need, there is no call, for
 10 another limiting instruction.

11 THE COURT: Ms. Polk, in providing that
 12 explanation, you want -- you said what, then? What
 13 was your explanation and how it might relate to the
 14 defense and what they should do?

15 MS. POLK: Your Honor, I'm not actually quite
 16 sure the specific part -- the specific part of my
 17 closing that Mr. Li objects to. What I said to the
 18 jury was 14 months after this case, then we hear
 19 about organophosphates. And that came out in the
 20 testimony at the trial, actually through many
 21 witnesses, that organophosphates was not something
 22 they had ever heard of until 14 months later.

23 MR. LI: Just for the record --

24 MS. POLK: And that I believe is the
 25 reference. Maybe Mr. Li can clarify. But I

1 believe that's the reference that they're
2 suggesting somehow was burden shifting.

3 And, again, I would remind the Court that
4 the jury has the benefit of all the instructions
5 which are to be read together. And the
6 instructions are clear. The state has the burden
7 of proof beyond a reasonable doubt. The defendant
8 does not have to produce any evidence.

9 My reference was telling the jury what
10 the testimony was when we learned about the
11 organophosphates, when Detective Diskin learned
12 about it.

13 MR. LI: Your Honor, may --

14 THE COURT: Mr. Li, I do want -- go ahead,
15 Mr. Li.

16 MR. LI: Your Honor, my -- the notes handed to
17 me say just -- this is the notes of the
18 prosecutor's statement. Just before the case went
19 to trial, defendant revealed a defense,
20 organophosphates. Coincidentally, only can be
21 tested right after the lethal dose of OP. Mr. --
22 you know -- Dr. Paul conveniently didn't know about
23 the OP theory might be wrong. All of those sorts
24 of thing, Your Honor.

25 And if I may approach. There is one

1 thing this Court perhaps has in its file but
2 perhaps does not. And this is the instruction from
3 the exact same testimony that was -- this is not
4 just a limiting instruction. This is
5 April 29th, 2011. This is after we had the same
6 issue arise with Detective Diskin.

7 THE COURT: Yes. I recall this. And I've
8 seen it fairly recently. I was just wondering how
9 it might have contrasted with what you're
10 suggesting.

11 So, Ms. Polk, the way you described when
12 the state first became aware of it neutrally like
13 that, I understand that type of argument and why
14 you may not think it's important or didn't, all
15 those arguments.

16 But what -- do you disagree with what
17 Mr. Li just characterized?

18 MS. POLK: I --

19 THE COURT: -- because -- go ahead.

20 MS. POLK: If he's -- I actually don't. What
21 part of it, Your Honor? I'm not following.

22 THE COURT: Well, the suggesting is that
23 somehow we didn't know about this until the defense
24 came up with this, essentially, is the gist of it.

25 MS. POLK: And that was the testimony of

1 Detective Diskin. And, in fact, that's the truth.
2 That's what came out in this trial is that
3 Detective Diskin did not know about this defense of
4 organophosphates until a couple -- in fact, the
5 Court heard until the interview of Dr. Paul only
6 because Mr. Hughes asked him about it. And
7 Dr. Paul admitted on the stand it wasn't even in
8 his report and that he didn't reveal it. That's
9 what the evidence in the case has been.

10 They get the Willits instruction. The
11 state is entitled to explain, and that is the
12 explanation.

13 THE COURT: The instruction, basically, states
14 the law. And I'm not striking anything or any
15 statement. But it does come very -- if it doesn't
16 cross the line, it certainly has the suggestion
17 that somehow it -- well, we can only know if these
18 people tell us. I mean, they have to tell us. It
19 does imply some kind of obligation to be told. And
20 the instruction was given before. And I think -- I
21 think the burden of proof instruction --

22 MS. POLK: Your Honor, I --

23 THE COURT: -- is appropriate.

24 MS. POLK: The Court read an instruction
25 yesterday. We dealt with the issue yesterday. I

1 disagree, frankly, with the Court's statement that
2 that implies that they had a burden to tell us.

3 What the law is is that the evidence is
4 available for testing equally to all both sides.
5 If the defense wants to argue that something in
6 those tests would have revealed their -- the
7 client's innocence, the state does get to argue
8 that to the jury. And I produced two cases for the
9 Court on point there.

10 THE COURT: And I -- that's never been in
11 dispute. You can talk about available evidence not
12 being tested. That could be discussed, and the
13 cases say that.

14 MS. POLK: And, again, this instruction on
15 Willits specifically says that the jury shall
16 consider the explanation for what the defense --
17 I'm assuming they're going to argue is a failure to
18 test. And that is what came out in trial. That
19 came out through multiple witnesses that the state
20 did not know about this evidence until shortly
21 before trial started.

22 THE COURT: Mr. Li, what was the statement
23 again? We need to get to the specific statement.

24 MR. KELLY: Your Honor, just for purposes of
25 the record, can I just put the -- about five

1 statements that were made during opening by
2 Ms. Polk that shift the burden?

3 THE COURT: Yes.

4 MR. KELLY: In addition to the one mentioned
5 by Mr. Li, Ms. Polk said, the defense wants to put
6 the state in a position of trying to prove a
7 negative.

8 That's one.

9 The fact is if they did not come up with
10 organophosphates that we tested and eliminated it,
11 they would have come up with some other compound
12 like plutonium.

13 And that shifts the burden because why do
14 we have to come up with anything? They have the
15 burden.

16 The next one was, the defense built a
17 house of cards in this theory. She said, again,
18 the defense built a house of cards that we are
19 going to blow down.

20 And then the defense wants you to ignore
21 the obvious, ignore your common sense.

22 And then finally before the break and
23 this -- she started talking about -- well, no.

24 I strike that. That's solely a 404(b) objection.

25 MR. LI: Your Honor, here's the quote. I

1 mean, we'll pull the transcript. But, I mean, the
2 prosecutor has written notes.

3 Just before the case went to trial,
4 defendant revealed the defense, organophosphates.
5 Coincidentally, only can be tested right after the
6 lethal dose -- right after -- can only be tested
7 right after.

8 I'm sorry, Your Honor. It cannot be --
9 you know -- the excuse or the explanation given.

10 That is -- you know -- Willits instruction is that
11 the defense -- one, the government failed to look
12 at its own evidence; and then, two, that the
13 defense failed to tell them about their own
14 evidence.

15 THE COURT: The last statement again, the
16 wording, Mr. Li?

17 MR. LI: Just before the case went to trial,
18 defendant revealed the defense, organophosphates.

19 This is -- I mean, it's exactly what the
20 prosecutor is saying and exactly what
21 Detective Diskin has said. We didn't know until
22 Mr. Paul -- I mean, Dr. Paul told us. And that's
23 our explanation for why we didn't test. That's
24 burden shifting.

25 And then they put it in the

1 argumentative. Coincidentally, that can only be
2 tested right after -- you know -- the lethal dose
3 has been administered.

4 We don't have custody of anything within
5 the time period of when you could have tested this.
6 Mr. Ray was indicted, like, four months after the
7 time period to test it had passed. This was always
8 in the custody of the government.

9 It's not only an inaccurate statement of
10 the law and burden shifting, but it pulls a slight
11 of hand as if we were able to go to the hospital --
12 and before Mr. Ray's been indicted when we were
13 talking to the prosecutors and saying, look, this
14 isn't a crime, and then we should have tested.

15 And I'll make one other point. We
16 actually didn't know about the organophosphates
17 until quite late into the case. And it was only
18 from listening to the random tapes that Ms. Do
19 found this.

20 We did know about the wood and the rat
21 poison quotes because those are interviews. But
22 the organophosphates is just in the middle of the
23 tape where some EMT shows up and says all this
24 stuff. And I don't recall the exact timing, but I
25 believe it's after -- it's after Mr. Ray's

1 indictment.

2 So at that point are we supposed to go to
3 the government -- it was after -- Ms. Do tells me
4 it was after we interviewed the ME, the medical
5 examiner. Sorry. And so at that point when we are
6 barreling towards trial -- the Court will recall
7 that we had a trial date, I believe, of -- in
8 August or September. We're barreling towards
9 trial. Is that the point we're supposed to tell
10 the prosecution about their own evidence?

11 MS. POLK: Your Honor, I'd like to respond to
12 this because this is fair comment on the evidence.
13 Everything I've said is based on the testimony of
14 witnesses in this trial.

15 When I said -- when I explained to the
16 jury why we didn't test for organophosphates, my
17 explanation was that that is something that you
18 have to test for within hours or days, and that was
19 based on the testimony of Dr. Paul.

20 That was not suggesting that the defense
21 in that first week was supposed to come in and test
22 the evidence. That was the explanation for why the
23 state didn't test for organophosphates and because
24 we learned through the course of the trial that any
25 testing -- well, first of all, we didn't test

1 because we didn't know about it.

2 But secondly, organophosphates,
3 coincidentally, just turned out to be something
4 that if you don't test for immediately, then your
5 tests are not going to be relevant anyway. That
6 was my questioning.

7 Attorneys in closing argument,
8 Your Honor, are entitled to argue the evidence and
9 comment on reasonable inferences. That's what I'm
10 doing. I can strongly comment on what the evidence
11 is and what it suggests. That doesn't become
12 burden shifting. That doesn't become improper
13 comment. My comments are have been appropriate. I
14 have -- everything I have said is based on
15 testimony of the witnesses.

16 Now, if Mr. Li wants to get up and argue
17 to the jury other inferences from the evidence, he
18 is entitled to do that. But he is not entitled to
19 shut me down and keep me from arguing reasonable
20 inferences based on the evidence and arguing the
21 jury instructions.

22 Again, over the state's objection, there
23 is a Willits instruction out there. And the state
24 is entitled to argue under the Willits instruction
25 what our explanation is for not testing certain

1 evidence. And that's what I've done.

2 THE COURT: The explanation cannot imply or
3 suggest that it's because the defense didn't do
4 their job and tell us what could have been a
5 problem because they really knew it -- they knew it
6 wasn't really a problem, so that's why they didn't
7 do it and they should have told us.

8 MS. POLK: I never once said the defense had
9 to tell us, Your Honor. But what the jury knows is
10 that the state did not know it, and that's what I
11 have reminded them is that we did not know it.

12 I never once said the defense had an
13 obligation to produce any evidence. I never once
14 said the defense had any obligation to tell the
15 state what their theory was. But the jury knows
16 and the testimony was that we did not learn about
17 it until shortly before trial. And that's what
18 I've argued to the jury.

19 THE COURT: Yes. And I think that the case
20 has been framed with a Brady issue. I look at that
21 and the other things that have occurred, the
22 initial problem in getting information that was
23 provided to the medical examiners. I think all of
24 that tends to color how the case has proceeded.

25 The first part -- the first part of this

1 is a correct statement of the law, the sentence.
2 I'm going to state that. It just reminds them of
3 this, of the basic law.

4 What I'm going to do is I'm going to ask
5 you -- like I said, the knowingly instruction
6 should not have been given. And as unusual as it
7 is, I'm going to correct that. And what I've done
8 on here -- I have some copies.

9 And while we do the recess, I'm going to
10 hand this to the -- have the attorneys look at this
11 and just figure out the mechanics of making the
12 revision.

13 Okay. We talked --

14 Mr. Li. You indicated --

15 Ms. Polk, what is your estimate for --
16 well, four hours each is what we discussed. Is
17 that -- that's what you're requesting?

18 MS. POLK: Actually, Judge, I don't have a
19 sense of how long I was yesterday. I have about an
20 hour more to go.

21 THE COURT: I kept track. You were about
22 90 minutes yesterday. You were just a little
23 under. And so what do you anticipate?

24 MS. POLK: I anticipate about an hour, but I'm
25 never very good at predicting time.

1 THE COURT: Okay. We discussed four hours.

2 Mr. Li, I want to confirm. You indicated
3 four hours; correct?

4 MR. LI: I'll do my best, Your Honor. But
5 it's been a very long trial, and there is a lot of
6 evidence. And frankly, Your Honor, there are a lot
7 of places where we feel compelled to correct the
8 record. And so it is very difficult for us to make
9 an accurate estimate as to what the time would be,
10 with all due respect to the prosecutor, in light of
11 what we consider to be many factual problems with
12 the closing arguments that they have made -- she
13 has made. And so we will do our best relating to
14 that.

15 THE COURT: Okay. We'll start as soon as we
16 can.

17 (Recess.)

18 THE COURT: The record will show the presence
19 the defendant, Mr. Ray, and the attorneys.

20 I agree that there needs to be some
21 introductory statement with the revision to the
22 instructions. But first -- and I have my
23 suggestion on that. But with regards to the
24 mechanics -- well, the easiest way to do this and
25 the most appropriate. Any ideas on that?

1 Mr. Hughes.

2 MR. HUGHES: Your Honor, I believe that a
3 judge, Your Honor, can give, basically, a preamble
4 to the jury to explain why page 8 is being
5 supplemented for a new page. The defense has
6 drafted some language that I believe could go down
7 that road as far as what should be told to the
8 jury.

9 THE COURT: Okay. And then I guess I can --
10 we can give them the amended page 8, and then Heidi
11 can figure out the mechanics. We can substitute
12 that. But what I want are the original page 8
13 filed and then, of course, the amended page 8, but
14 maybe just give them with this introduction. What
15 I had was --

16 Well, Mr. Li.

17 MR. LI: Your Honor, we submitted language,
18 but I'm sure the Court also has.

19 THE COURT: If the parties agree on that
20 language, that's what I'll use. If there is no
21 argument as to that, that's fine.

22 MR. HUGHES: That's fine, Your Honor.

23 THE COURT: Okay. I'll just use the language
24 proposed.

25 So -- and another thing, and I'll just

34

1 bring it up, someone -- Ms. Rybar informed me that
2 apparently one of the security people overheard a
3 juror making a comment apparently to another juror
4 that we may get out today. I don't know that
5 that's anything that needs to be addressed further.
6 But I always report these things when I hear them.
7 So I don't see any need to talk to any jurors about
8 that. But, again, I always let you know.

9 Ms. Polk, do you see any reason to do
10 anything more?

11 MS. POLK: No, Your Honor.

12 MR. LI: No, Your Honor. I hope we get out
13 today.

14 THE COURT: Okay. Then the instructions that
15 I have are -- I'll go ahead and make a copy. The
16 only difference is it says at the top, amended
17 page 8, June 16, 2011. And that will be given to
18 them at the start.

19 Okay.

20 Thank you.

21 (Recess.)

22 THE COURT: The record will reflect the
23 presence of the defendant, Mr. Ray; the attorneys,
24 and the jury.

25 Ladies and gentlemen, there is going to

1 be a revision to your instructions. The set of
2 instructions given yesterday made references to the
3 mental state of knowingly. Those instructions do
4 not apply in this case and were incorrectly given
5 to you. They've been deleted from the revised
6 instructions. You must not consider the
7 instruction regarding a knowing mental state in any
8 way in this case.

9 And what I'm going to do is ask Ms. Rybar
10 to hand you out right -- to you right now an
11 amended page 8 that you can just keep. Later we
12 will actually substitute yours, put the new page in
13 for you and collect the pages you've been given.

14 If you have any notes, those can be
15 transferred -- and I don't know if any of you were
16 taking notes. The page itself, that you will be
17 able to do that. But it will be substituted. But
18 that new amended page 8 is the one that will apply.
19 And it just deletes some of the language there as
20 indicated.

21 And then I've given some verbal or oral
22 instructions. And it's very important that the
23 jury realizes that you get the written instructions
24 and you have instructions through the -- through
25 the trial and you have to apply the instructions

36

1 that you find do apply to the case. And you will
2 get written instructions.

3 But occasionally I have given some verbal
4 instructions that you are to consider as well. And
5 I'm going to give one that I -- it's really one
6 that I did verbally yesterday. But I'm going to
7 state that a defendant is always free to challenge
8 the sufficiency of the evidence with respect to an
9 element or issue upon which the state bears the
10 burden of proof. Even without advance notice of
11 intent to do so, a defendant need not provide the
12 prosecutor or the Court with a preview of his case
13 or his arguments.

14 So with that, Ms. Polk, are you ready to
15 continue?

16 MS. POLK: I am, Your Honor. Thank you.

17 Good morning. I'm going to pick up where
18 I left off yesterday and play that clip for you
19 that I couldn't get to play. But I want to put
20 that clip, again, in context for you. Because as
21 you heard during the testimony of Dr. Paul, the
22 defense's doctor, he never heard what's on that
23 audio. He never heard the words of the defendant
24 when the defendant describes how he intentionally
25 is bringing his participants to this extreme mental

1 altered state.

2 Just to remind you, this is one of the
3 lists that Dr. Paul made for you when he testified.
4 And, again, Dr. Paul -- one of his factors with
5 each of the patients for questioning the diagnosis
6 of heat stroke is that patients weren't dehydrated.
7 Some of the patients, of course, were mildly
8 dehydrated. Others were dehydrated, but it wasn't
9 a constant.

10 But I want to remind you that Dr. Paul's
11 own organization, the National Association of
12 Medical Examiners, in their diagnostic position
13 paper diagnosing deaths, the cause of death in heat
14 environments specifically says that dehydration is
15 not necessary for that diagnosis.

16 Secondly, Dr. Paul himself with respect
17 to each of the patients does note that a mental
18 status change is a factor that he found present.
19 And, of course, he admitted and Dr. Dickson and all
20 the doctors talked about how mental and altered
21 mental state is a sign and symptom of heat stroke.
22 And Dr. Dickson told you, in fact, it is the
23 hallmark. When you reach that point of altered
24 mental state, that is the hallmark of heat stroke.

25 So I want to play this audio for you and

1 ask you in particular to listen to the defendant as
2 he describes his intention to induce that extreme
3 altered mental state that even Dr. Paul admits
4 would be present in heat stroke, and remind you
5 that Dr. Paul told you he spent 80 to 90 hours on
6 this case, and yet he never listened to this audio.

7 (Audio played.)

8 MS. POLK: I want to move on now to the third
9 question. Actually, the second question that I
10 have written up there is, did the defendant's
11 conduct pose a substantial and unjustifiable risk
12 of death?

13 And then the third question, was the
14 defendant aware and did he consciously disregard
15 that risk?

16 Now, again, the state does not have to
17 prove that Mr. Ray knew that Kirby, James, or Liz
18 was dying. What we have to prove is that Mr. Ray
19 was aware and consciously disregarded the
20 substantial and unjustifiable risk of death his
21 conduct created, and that's to prove the crime of
22 manslaughter.

23 To prove the crime of negligent homicide,
24 the lesser offense, we would have to prove that the
25 defendant failed to perceive the risk of death that

1 his conduct created.

2 But I suggest to you that the evidence in
3 this case proves that Mr. Ray was aware and
4 consciously disregarded that substantial and
5 unjustifiable risk that his conduct would create
6 death.

7 The defendant's conduct during the heat
8 challenge itself is clear proof beyond any
9 reasonable doubt that he was aware and he did
10 consciously disregard that risk. His conduct
11 inside the sweat lodge as round after round after
12 round, more and more people got sick and his
13 conduct about what he did and what he did not do
14 shows you that what was happening is what he
15 intended to happen.

16 You have heard participants testify.
17 You've heard the audio clips about what his intent
18 was to create this extreme altered mental state.
19 And all of that is evidence that what was happening
20 is what the defendant intended to happen. He did
21 not intend for people to die. But he intended to
22 use that heat to take them up to the edge of death
23 so that they would have this extreme altered mental
24 experience and think they were getting something
25 for their \$10,000.

1 And that's why he doesn't react. That's
2 why he doesn't stop the ceremony when people pass
3 out and are dragged out right in front of him.
4 This is what he intended.

5 Now, I'm going to go through some of the
6 testimony you've heard in this case. Now, I want
7 to remind you, first of all, that what the lawyers
8 say is not evidence. The testimony is the
9 evidence, and you need to rely on your notes and
10 your recollection as to what was said.

11 I'm going to go through the testimony.
12 It was three and a half months of testimony. And
13 I'm going to try to summarize for you some of the
14 stronger points about what you heard.

15 Witness after witness in this trial has
16 testified about the growing chaos inside the tent,
17 starting really around the end of Round 4. Amy
18 Grimes passed out on top of Kim Brinkley, as you
19 will remember. And Kim was seated at the 4:00 to
20 5:00 o'clock position, and that was around the
21 fourth. And Kim testified that she yelled out for
22 help and that Amy was dragged out.

23 So Kim's testimony was around the fourth.
24 Kim is in the 4:00 to 5:00 o'clock position. Amy
25 passes out on top of her, No. 8. Kim screamed out,

1 yelled out, and somebody drags out Amy right out
2 past the defendant as early as around the fourth.

3 Lou Caci, who was seated at the
4 12:00 o'clock position originally, delirious and
5 unconscious, falling into that pit of heated rocks.

6 You have heard so much testimony from
7 participants about the growing chaos, the calls for
8 help, the moans, the vomiting, the people passed
9 out, unconscious, dragged out limp and lifeless
10 right in front of the defendant.

11 But as I go through this testimony, I ask
12 you to closely examine the conduct of Mr. Ray
13 inside that tent. Closely examine all this
14 information he had about people being in distress
15 as early as the fourth round, long before the end
16 of that ceremony, and all the opportunities he had
17 to just stop the ceremony and take care of his
18 participants.

19 But he didn't. His event, this
20 heat-endurance challenge, his desire to create this
21 extreme event to make participants think they were
22 experiencing something unique and took precedence
23 over the lives of his participants.

24 So here's a quick summary. Debbie Mercer
25 testified that she dragged out 10 people during the

1 heat-endurance challenge right in front of Mr. Ray,
2 who remained at his position at the door. She
3 testified that in all, she believes she assisted
4 about 25 people.

5 Beverly Bunn testified that everything
6 went crazy around the sixth round. Dr. Bunn saw
7 Sidney Spencer dragged out completely lifeless
8 right past the defendant. Dr. Bunn's testimony was
9 that the defendant shouted out that everyone should
10 quite down. I am in charge. No one should talk.

11 Scott Barratt told you that he left the
12 tent around the fourth round, and then he crawled
13 back in for the sixth round. He told you that the
14 first thing he noticed as he went back into that
15 back area was a large woman in his path passed out.
16 And I think you can infer from the evidence that
17 that was probably Linda Andresano.

18 Scott Barratt testified that Mr. Ray was
19 telling someone to move Linda, but the person could
20 not because Linda was on his leg. And when Scott
21 tried to move Linda away from the pit and the heat,
22 he told you that the defendant yelled at him to
23 stop.

24 Scott Barratt, then, thought he would lie
25 in front of Linda, between Linda and the pit, but

1 was afraid that the defendant would yell at him
2 again. And Scott testified that the defendant
3 could see Linda from his position but said, just
4 leave her. We need to keep going.

5 All these opportunities to stop that
6 event. These deaths were not inevitable. You know
7 that Linda Andresano was later dragged out after
8 the ceremony was over unconscious. And ask
9 yourselves, if the defendant had stopped the
10 ceremony when he had these warnings, would Kirby,
11 James, and Liz be alive? But for the defendant's
12 conduct, would they be alive?

13 Mike Olesen, the businessman from Canada,
14 testified that he left the tent after the fifth
15 round and returned for the final round. He told
16 you that as he came in to find a place to sit, a
17 participant named Christine was in his path
18 babbling and holding on to her tobacco pouch.
19 Olesen testified that the defendant yelled at him
20 to get out of the way and let a lady go back to her
21 seat.

22 Olesen said he next tried to help a lady
23 who was passed out and was leaning up against the
24 side of the tent. And, again, the evidence
25 suggests that that lady was Linda Andresano. And

1 when Olesen tried to make her lie down without
2 success, Olesen asked for help but found that
3 everyone around was out of it.

4 Mr. Ray told Olesen to leave the woman
5 alone, that she would be fine, and that they needed
6 to continue the ceremony. That was his testimony.

7 When the event was over, Olesen and Lou
8 Caci both testified that they helped pull Linda
9 out. And then Mr. Olesen told you he went back for
10 Christine who was clinging to her pouch, delirious,
11 and babbling.

12 And then outside Mike Olesen testified
13 that he saw Mr. Ray go to Christine -- this is
14 outside when the event is over -- and he watches
15 Mr. Ray go to Christine. And according to Dawn
16 Gordon, the defendant took Christine's hand, called
17 her name, and said, wake up, wake up.

18 You can infer from that evidence that
19 what was happening was what the defendant intended
20 to happen.

21 Two Dream Team members testified in this
22 trial about Liz Neuman and an incident that
23 happened on Wednesday while the participants were
24 on their Vision Quest.

25 Was Liz possibly upset with herself due

1 to the reprimand that she and the others had
2 received from the defendant for drinking wine and
3 maybe disturbing his nap?

4 Was Liz determined inside that tent to
5 prove to the defendant that she was more than that?
6 Possibly.

7 You do know that Liz took a sudden turn
8 for the worse inside the tent and that participants
9 told Mr. Ray that Liz was struggling.

10 I want to talk about Laura Tucker's
11 testimony. Now, these are not exact positions in
12 the sweat lodge. This is not a diagram to scale.
13 These are the approximate positions in this
14 photograph.

15 Laura Tucker testified that she sat at
16 the 9:00 to 10:00 o'clock position near Liz Neuman.
17 And she told you how Liz had actually coached her
18 on tips on how to survive the sweat lodge. And
19 Laura told you she found Liz's presence a great
20 comfort.

21 Ms. Tucker testified that around the
22 fourth or the fifth round, Liz unexpectedly left
23 Tucker's side and moved closer to the pit of hot
24 rocks eventually coming to rest on Tucker's raised
25 legs. When Laura Tucker tried to get Liz to come

1 back from the heat, remember she said how Liz
2 brushed her hand away.

3 Ms. Tucker, concerned about Liz's
4 condition, told you that she called out to Mr. Ray,
5 James, it's Laura. I'm concerned about Liz.
6 Tucker testified that Mr. Ray did not investigate
7 the situation, did not leave his spot by the door
8 and come over and check up on Liz. Instead,
9 Mr. Ray said, Liz has done this before, and she
10 knows what she's doing, again, suggesting to you
11 that what was going on and the information that
12 Mr. Ray had was acceptable to him because this is
13 what he intended to happen.

14 After the defendant had told everyone in
15 the tent that Liz knew what she was doing, Laura
16 then touches Liz's left shoulder and asks Liz if
17 she's all right. Liz, who had just heard Mr. Ray
18 say that Liz was fine, that she knew what she
19 was doing, answers, yes, in a voice, according to
20 Laura Tucker, that was labored but loud enough for
21 Laura to hear.

22 Tucker then asked Liz if she needed to
23 get out, and Liz said, no, not moving except to
24 turn her head. And Tucker testified because she
25 had heard Mr. Ray say that Liz knew what she was

1 doing and because Liz had responded promptly,
2 Tucker let things be.

3 Laurie Gennari sat on the other side of
4 Liz. She testified that she glanced at Liz around
5 the sixth round, and in her words, Liz looked
6 awful, like a drunk. Ms. Gennari heard Laura
7 Tucker call out that Liz was in trouble.

8 Ms. Gennari heard Mr. Ray respond, Liz knows what
9 she is doing. And Ms. Gennari described the
10 collapsing of Liz Neuman and how when asked by
11 Laura Tucker if she wanted to leave, Liz responded
12 flurrying, no. No. No. No. No. No.

13 Debbie Mercer, on the outside, testified
14 that she was stationed by the door of the tent for
15 this heat-endurance challenge. When the flap
16 opened, Ms. Mercer heard someone say, I can't get
17 her to respond. And Ms. Mercer's testimony to you
18 was that she heard Mr. Ray say, she's been down
19 this road before. She'll be okay. Debbie Mercer
20 also heard the defendant say to worry about
21 yourself. Don't worry about others.

22 Lou Caci. Mr. Caci testified that he had
23 started in the 11:00 to 12:00 o'clock position near
24 the pit. You heard all that testimony about how
25 horrible it was when he fell in and burned himself

1 and got out. And then Mr. Caci told you how he
2 actually went back in for the last round. He told
3 you that as he crawled back in, Mr. Ray still
4 stationed at the door said to him, this one is for
5 you, Lou.

6 And Mr. Caci told you that he took a
7 position this time near Liz Neuman at the 7:00 to
8 8:00 o'clock position and that someone asked for
9 his help to get Liz off of her. Mr. Caci described
10 for you Liz's breathing at that time. And this is
11 now the last round. He told you that Liz's
12 breathing was similar to the breathing of his
13 father and his brother shortly before both of them
14 had died.

15 Kim Brinkley told you she sat at the 4:00
16 to 5:00 o'clock position for the entire time. And
17 she testified that she heard Laura yell out she was
18 concerned about Liz, that Liz was unresponsive, and
19 that the defendant replied, Liz has done this many
20 times. She'll be fine.

21 Sadly, what we know is that Liz was not
22 fine and that she was pulled out of the tent about
23 two rounds later after Mr. Ray had concluded this
24 heat event, that she was unconscious, and she never
25 recovered.

1 Outside, Nell Wagoner, the doctor,
2 gynecologist, from Alaska, told you that she
3 encountered Liz with no one tending to her. This
4 is when it's over. Dr. Wagoner testified how she
5 laid by Liz and urged her, wake up. Liz, wake up,
6 and that Dr. Wagoner stayed with Liz until the
7 paramedics arrived.

8 Dr. Wagoner testified Liz had foaming
9 from the mouth. And she told you that Liz's skin
10 was cold. Now, remember that information when you
11 consider this question of Liz's body temperature.
12 Before the paramedics even arrived to take that
13 first temperature, Nell Wagoner, who is a doctor,
14 testified that she had touched Liz and that Liz was
15 already cold.

16 Jennifer Haley testified how she had
17 taken two cups of water, poured it on Liz. But you
18 can infer from all the evidence in this case that
19 most likely Liz was cooled down like all the others
20 were, with the hose or with water from those
21 five-gallon buckets that were on the scene.

22 You also know that many participants
23 testified about how hot they were, how they were
24 hit with cold water, and how quickly they went from
25 being hot to being shivering cold.

1 This picture shows you the entrance, the
2 door to the sweat lodge. Jennifer Haley testified.
3 She told you she was a Dream Team member. And she
4 told you how Kirby had died early in the Samurai
5 Game. Ms. Haley testified how cold Kirby appeared
6 during the Samurai Game and that when it was over,
7 Kirby was teary eyed and hugged Haley saying,
8 thanks for being so nice to me.

9 Stationed outside this heat event,
10 Ms. Haley testified that from the outside during
11 the event, she heard someone say, you need to get
12 her out.

13 Melinda Martin, staff with James Ray
14 International, testified that she led Kirby Brown
15 to her spot for the Vision Quest and that Kirby
16 seemed shaken. And this is after the Samurai Game
17 had just ended. 36 hours later when Ms. Martin
18 retrieved Kirby from her spot for the Vision Quest,
19 she told you that Kirby had decorated her medicine
20 wheel.

21 Melissa Phillips testified in this case.
22 She told you that she sat at the 2:00 o'clock
23 position and that she left after the third round.
24 Melissa testified that she, then, came back in for
25 the last three rounds because, in her words, she

1 did not want to disappoint Mr. Ray, herself, or the
2 Dream Team members.

3 Ms. Phillips testified that at that point
4 she laid face down with her face turned toward
5 Kirby Brown. Melissa noted the distress of Kirby.
6 And Melissa told you she called out five to six
7 times that there was something wrong with Kirby and
8 that Kirby needed to be taken out.

9 Melissa testified she called out to the
10 defendant loud enough for him to hear her and that
11 she heard someone respond, she's fine, but
12 Ms. Phillips did not recognize that voice.

13 Ms. Phillips testified a participant
14 named Teresa -- and the evidence would suggest in
15 this case that was probably Dawn Gordon -- directed
16 others to roll Kirby over and that Kirby stopped
17 that snorting sound. Ms. Phillips told you at that
18 point she could no longer tell if Kirby was even
19 breathing.

20 Phillips also told you that several
21 people passed out and were dragged out during this
22 event right past Mr. Ray, who was seated at the
23 door. And, finally, Ms. Phillips testified that
24 she believed someone tried to crawl out the back of
25 the lodge and that the defendant chastised him not

1 to do it. Ms. Phillips told you she believed that
2 person was James Shore.

3 Laurie Gennari testified, again, that she
4 sat at the 9:00 o'clock position and that she
5 stayed in the tent the whole time and that she
6 moved to the 3:00 o'clock position right before the
7 last round. And from that position, Ms. Gennari
8 testified she heard a voice call out from the area
9 where Dawn Gordon, Kirby Brown, and James Shore
10 were.

11 Ms. Gennari told you she heard a voice
12 call out, she's not responding, and at another time
13 she heard someone call out, she's not breathing.
14 Ms. Gennari heard Mr. Ray respond, leave her there.
15 We'll deal with it at the end of the round.

16 Dr. Beverly Bunn told you she sat at the
17 2:00 to 3:00 o'clock position, again, in the area
18 near James Shore and Kirby Brown for the first four
19 rounds. But then she decided she needed to get
20 out. And you heard her testimony that as she
21 crawled for the door between the fourth and the
22 fifth round, Mr. Ray said to her, Beverly,
23 especially you, you are stronger than this. You
24 can get through this.

25 Dr. Bunn told you she had been working

1 directly with Mr. Ray all week, as Kirby had been,
2 and that she believed Mr. Ray knew better than
3 Beverly herself because he had done this before.
4 Beverly Bunn told you she didn't want to let
5 Mr. Ray down, and so she made the decision to stay
6 in.

7 So Beverly kept crawling past Mr. Ray and
8 ended up at the 8:00 to 9:00 o'clock position. And
9 at that new spot, Dr. Bunn told you she could get
10 some air now when the flap was opened, and so she
11 stayed in for the entire event.

12 Around the sixth or the seventh round,
13 Dr. Bunn's testimony to you was that she heard a
14 voice, and the voice she heard said, I can't get
15 her to -- someone's not breathing. Dr. Bunn told
16 you she heard Mr. Ray respond, door is closed.
17 This round has begun. We'll deal with it after the
18 next round.

19 Dr. Bunn testified they were all told to
20 be quiet, and at the end of the round, Mr. Ray
21 opened the door and asked everyone who was outside
22 to come back in. And Dr. Bunn told you she had
23 heard that someone was in trouble and that she was
24 waiting for Mr. Ray to go check up on them, but he
25 did not.

1 Instead, what did he do? He started
2 another round, introducing more rocks, more heat,
3 more water, and more searing steam. He had
4 information that in the back somebody was in
5 trouble, not responding, testimony from witnesses
6 that someone had said she's not breathing, and
7 Mr. Ray let's another round go by.

8 When it was over, Dr. Bunn had to crawl
9 clockwise out of the tent to get out. And you saw
10 Dr. Bunn's demeanor on the stand as she struggled
11 to hold back her tears, remembering how she crawled
12 past her friend Kirby lying there face up, in
13 Dr. Bunn's testimony, making a snorting, gurgling
14 sound and that there was a man lying next to her.

15 And think about this. At that point,
16 according to witnesses, Kirby was still breathing,
17 according to Dr. Bunn, still breathing. And what
18 you know from the doctors is if a heart has a
19 heartbeat that it still has a shockable rhythm.

20 How much more time went by before Kirby
21 was pulled out finally by Debbie and Sarah Mercer?
22 How much more time was lost while Mr. Ray, who took
23 care of himself first, came out of the sweat lodge
24 first, celebrated his accomplishment, got some
25 water, went over to the shade, took a seat, leaving

1 others to deal with the aftermath and eventually
2 telling Debbie Mercer that she could open the back
3 of the tent but only if it was -- if she absolutely
4 had to?

5 This is Mr. Ray, who during the ceremony
6 told somebody to urinate in that tent. And now
7 that it's over, now that he has information from
8 Debbie Mercer that three people are still down, he,
9 first of all, doesn't get up and go help open the
10 back of the tent to get them out, but, secondly,
11 tells Debby she can only open the back of the tent
12 if it's absolutely necessary.

13 If Mr. Ray had paid attention to the
14 calls for help for Kirby when they were first made
15 before the beginning of the seventh round, would
16 Kirby Brown still be alive? And if Mr. Ray had
17 done something to get Kirby out when it was over,
18 had an AED onsite and worked on her faster, would
19 Kirby still be alive?

20 Nell Wagoner, again, the doctor from
21 Juneau, Alaska, testified that she stayed in the
22 sweat lodge the whole time at the 5:00 o'clock
23 position very close to Mr. Ray. Dr. Wagoner told
24 you how she lost track of time, but she was aware
25 that people were being dragged out and that others

1 seemed to be unconscious.

2 Dr. Wagoner testified around the middle
3 rounds, the flap was put down, and she heard
4 someone say, wait. There is one more. And
5 Dr. Wagoner testified she sat just a few feet from
6 the defendant and heard him reply, they'll have to
7 wait until after the next round.

8 Mark Rock was in the 12:00 o'clock
9 position. He testified that around the sixth or
10 the seventh round, he heard Kirby Brown making a
11 gurgling noise and that the sound was the only
12 sound that there was in the tent at the time and
13 that it was between rounds.

14 Mr. Rock testified that when Mr. Ray
15 wanted to close the gate, Mark Rock heard someone
16 say, I think she's in trouble. She needs to get
17 out. Mr. Rock testified he believed the voice came
18 from the 10:00 o'clock position. And he testified
19 that he then heard Mr. Ray say, we're closing the
20 gate, and we'll deal with it after this round.

21 Mr. Rock also heard James Shore
22 struggling during those final rounds. And then you
23 learned from Mr. Rock that between rounds, he was
24 actually lifting the edge of the flap to get some
25 air in order to survive this event himself.

1 Kim Brinkley told you she sat -- again,
2 she sat at the 4:00 to 5:00 o'clock position. She
3 testified she heard labored breathing coming from
4 the area where Kirby Brown sat and that it was
5 concerning. Kim Brinkley told you she heard
6 Mr. Ray say, wait until the end, and we'll take
7 care of her.

8 Now, Kim Brinkley was certain that the
9 comment was in response to the earlier conversation
10 about Liz Neuman, but you can conclude otherwise if
11 the rest of the evidence leads you to that
12 conclusion.

13 Dawn Gordon testified that James Shore
14 dragged out Sidney Spencer, who Dawn testified
15 described as being unconscious between the sixth
16 and the seventh round, then came back to his
17 position in the tent near Kirby. Dawn told you
18 that Mr. Shore then called out, we need help over
19 here.

20 And think about this. Who was he
21 referring to at that point? Was he referring just
22 to Kirby, or was he referring to himself as well?
23 We need help over here.

24 Dawn told you that James Shore started
25 struggling early on and was making comments

1 throughout, suggesting to her that he was
2 struggling. And so after dragging Sidney Spencer
3 out, he goes back to the back part of the tent and
4 he calls out, we need help over here.

5 You heard testimony that Ms. Gordon
6 originally told the detective that Mr. Shore had
7 yelled it out. But on the stand Ms. Gordon
8 insisted Mr. Shore just put it out there. Dawn
9 Gordon acknowledged that she told the detective
10 that Shore yelled out for help but that he said,
11 Kirby needs to get out.

12 When Mr. Ray stated, the door is closing,
13 no one can leave, that's when Dawn told you that
14 she and James pushed and pulled Kirby to her side
15 and encouraged her to keep breathing.

16 At the end of the seventh round now,
17 Gordon testified that Mr. Shore again called out
18 for help, this time in a weaker voice. And, again,
19 the defendant announced the door was closing and
20 that no one could leave.

21 Now, on the stand Dawn Gordon said the
22 comments by Mr. Ray were just statements, the door
23 was closing. You know that's not how other
24 witnesses described it. And you decide.

25 Dawn Gordon testified that Mr. Shore then

1 lifted the edge of the tent. Now, we're into that
2 final round. Mr. Shore in a last ditch effort to
3 survive and to help Kirby survive lifts the edge of
4 the tent to get some fresh air. And Ms. Gordon
5 told you that Mr. Ray yelled out, turn off the
6 light.

7 Ms. Gordon testified that Mr. Shore had
8 been struggling for most of the event and that
9 after that, things got quiet. And at the end of
10 the ceremony, they were both unconscious, not
11 moving.

12 Debbie Mercer testified, again, that she
13 was by the door whenever the door was open between
14 rounds. Near the end of the heat-endurance
15 challenge, Sarah Mercer heard someone say -- I'm
16 sorry. Jumped ahead.

17 Debbie Mercer told you that around the
18 sixth or the seventh, James Shore dragged someone
19 to the door of the tent right in front of Mr. Ray.
20 Debby told you how she saw him hit his head on one
21 of the beams inside the sweat lodge. And, in fact,
22 Exhibit 375, which is the autopsy report for
23 Mr. Shore, does indicate an abrasion on his
24 forehead.

25 Debbie Mercer testified she later heard

1 someone say so-and-so is unconscious. I can't get
2 them to respond, and that she heard Mr. Ray reply,
3 really? They're not breathing?

4 And someone answered, no, and that
5 Mr. Ray stated, they'll be fine. That's where they
6 need to be. And then Debbie Mercer told you
7 Mr. Ray ordered 10 more rocks to be brought in and
8 started the final round.

9 Debbie testified that Mr. Ray then
10 instructed her to close the door and that he never
11 checked up on anyone. Debbie testified no one was
12 taken out of the tent unconscious at that time and
13 that things were then quiet for that last round.

14 Sarah Mercer, the Mercers' daughter,
15 testified she was by the door whenever the door was
16 opened. Near the end of the heat-endurance
17 challenge, Sarah Mercer heard someone say, there's
18 a few people unconscious.

19 Sarah's testimony to you was that she
20 then heard Mr. Ray say, that was a good thing.
21 Sarah further testified she heard someone ask
22 Mr. Ray if they should talk them out and heard
23 Mr. Ray reply they had only one round, to just
24 leave them there, and that they would be okay.
25 Sarah testified that the final round lasted

1 approximately 15 more minutes.

2 And, finally, Fawn Foster testified that
3 while she was sitting outside the tent on a log,
4 she heard someone say there were three people down
5 inside, and she heard Mr. Ray ask whether they were
6 conscious. Fawn told you she did not hear a reply
7 but heard Mr. Ray say, leave them until the end of
8 the next round.

9 That, ladies and gentlemen, is proof
10 beyond a reasonable doubt that Mr. Ray was aware
11 and consciously disregarded the substantial and
12 unjustifiable risk that his conduct would cause
13 death.

14 But there is more. You heard that
15 participants signed a waiver before participating
16 in this event and that this waiver -- in fact, you
17 will be able to see them when you go back to
18 deliberate. But this waiver releases Mr. Ray and
19 JRI of liability for acts resulting in death. And
20 you can consider that, ladies and gentlemen, as
21 evidence that Mr. Ray knew that his conduct created
22 a substantial and unjustifiable risk of death.

23 In particular, that waiver states -- it
24 warns participants of a, quote, a sweat lodge
25 ceremony, a ceremonial sauna involving tight,

1 enclosed spaces and intense temperatures. It
2 informed participants that, quote, there are
3 inherent risks in these activities. It warned
4 participants that, quote, there is a risk I may
5 receive injuries requiring medical attention.

6 It warned participants that people,
7 quote, may have been seriously injured by
8 participating in the activities. And, finally, it
9 warned participants that they might, quote, suffer
10 physical, emotional, financial, or other injury
11 during any of the activities. And there is and can
12 be no assurance or guarantee regarding my health or
13 safety in connection with my participation in the
14 activities.

15 It is hard now to argue that there is not
16 an awareness of the risk of death of these
17 activities.

18 Looking at the entire record, ladies and
19 gentlemen, it is also clear that Mr. Ray's conduct
20 was a gross deviation from the standard of conduct
21 that a reasonable person would observe in that
22 situation. And that's another finding you need to
23 make beyond a reasonable doubt.

24 A reasonable person knows that if you
25 spend too much time in a superheated environment,

1 you will die. It doesn't matter if it's a sweat
2 lodge, a sauna, a car on a hot summer day in
3 Phoenix, or just the summer heat in the desert. If
4 you are too hot for too long, it will be life
5 threatening. It does not require special knowledge
6 or a scientific or medical background to know that
7 exposure to, quote, a tight, enclosed space and
8 intense temperatures, is life threatening.

9 The uncontested testimony of Dr. Dickson,
10 the state's medical expert, was that a person
11 should prepare oneself prior to participating in an
12 event that involves exposure to a tight, enclosed,
13 extreme, heated environment for over two hours.

14 Dr. Dickson testified that a participant
15 in preparing yourself should take time to
16 acclimate, to get plenty of sleep, to be well
17 rested, should be in top physical condition, should
18 not fast prior to the event because that weakens
19 the person, should be well hydrated in advance of
20 exposure and hydrate continuously throughout the
21 event, should be educated on the signs and symptoms
22 of heat illness, and should get out of the heat and
23 immediately cool off before experiencing a change
24 in mental status, the hallmark of heat stroke.

25 And, finally, Dr. Dickson told you that

1 participants should look out for each other and
2 especially look out for changes in mental status
3 because you may not recognize it in yourself. And
4 when that occurs, you need to get out of that heat
5 environment.

6 All the doctors testified that
7 heat-related injuries occur on a continuum from
8 heat exhaustion at the early stage to heat stroke
9 at the later stage. Symptoms of heat illness
10 include muscle cramps, nausea, vomiting, weakness,
11 and the hallmark, that altered mental status.

12 Dr. Dickson testified that that is the
13 demarcation between heat exhaustion on one end and
14 heat stroke on the other and that once you move
15 into heat stroke, death is imminent if you do not
16 remove yourself from that heat and cool yourself
17 down.

18 And even the defense's doctor, Dr. Paul,
19 conceded that if someone passes out in a heated
20 sweat lodge, they should be immediately removed.

21 Now, contrast that with how Mr. Ray
22 prepared the participants for this heat event.
23 First of all, he kept the heat-event challenge a
24 surprise from most of the participants, although
25 some told you they knew it was coming. And Mr. Ray

1 told them of the event for the first time about one
2 hour before it's commencement.

3 The only preparation that Mr. Ray
4 provided was his pre-event briefing, during which
5 he described for participants all the signs and
6 symptoms of heat-related illness, but then told
7 them to ignore them, and that it was safe to do so.

8 Down by that intentions fire where they
9 burned some of their writings, according to Dr.
10 Beverly Bunn and others, Mr. Ray told them that it
11 was okay to pass out inside the sweat lodge and
12 that they'd be taken care of.

13 Mr. Ray intentionally weakened them in
14 advance by subjecting them to that 36-hour fast
15 from food and water, leaving them hungry and
16 dehydrated and not grounded.

17 All week long he advised them to forego
18 sleep in the interest of accomplishing his
19 assignments. And during the heat event himself, he
20 did not allow them to hydrate unless they went
21 outside.

22 Mr. Ray intentionally educated them to
23 ignore the warnings of heat illness that he knew
24 that they would experience inside the sweat lodge,
25 and he told them to welcome those signs and

1 symptoms of heat illness and to endure and push
2 through them.

3 Mr. Ray encouraged the participants to
4 let everyone have their own experiences and to not
5 interfere. And the witnesses from the stand told
6 you that that was one of the reasons they didn't
7 intervene or come to the aid of others. And rather
8 than teach the participants to recognize that an
9 altered mental status is the hallmark of heat
10 exhaustion and take immediate steps to cool down,
11 Mr. Ray assured them that they could push through
12 and endure and that they would have a breakthrough.

13 You heard this testimony about Mr. Ray's
14 actions when the sweat lodge was over, how he came
15 out, how he gave his victory wave, how he got hosed
16 off, how he got a drink and he sat in the shade.
17 Meanwhile, the Dream Team members and the Mercers
18 are dealing with that horrifying chaos.

19 While Mr. Ray, according to witnesses,
20 did go over to Christine, who was calling her
21 name -- his name and saying, James, James, why did
22 this happen, he went over and he took her hand and
23 said, Christine, wake up. What was happening at
24 that point was okay with Mr. Ray. This is what he
25 expected, and this is what he intended.

1 The Dream Team members, people who had
2 not been part of this event before, described for
3 you how horrifying it was. And what you know in
4 those first minutes, Mr. Ray was sitting on a chair
5 in the shade drinking water. From his perspective,
6 they were having this altered mental experience
7 that he wanted them to have.

8 Even when Debbie Mercer came running over
9 to him telling him, there are three people still
10 inside, what did Mr. Ray do? He did not get up.
11 He sat there, and he told Debbie she could open up
12 the back only if it was absolutely necessary.

13 And then Debbie and Sarah Mercer, two
14 women who are about my size, go to the back of the
15 tent, open it up, and try to pull out the three
16 people. Mr. Ray did not come over and help.

17 Over and over in this case you have heard
18 evidence that proves beyond a reasonable doubt that
19 Mr. Ray intended everything that occurred to occur
20 except death. He intended to bring these
21 participants up to the edge of death, to have that
22 near-death experience, to have that altered
23 mental -- that extreme altered mental state that he
24 told them was a good thing. His behavior beyond a
25 reasonable doubt is the crime of reckless

1 manslaughter.

2 I want to read for you the definition of
3 "gross deviation" because, again, you need to find
4 beyond a reasonable doubt that his conduct was a
5 gross deviation from what a reasonable person would
6 do in that situation.

7 And on page 9 of your instructions, you
8 are told, first of all, the meaning of "substantial
9 and unjustifiable risk." In civil cases a
10 defendant can be liable if the risk of harm caused
11 by his conduct is merely unreasonable. In criminal
12 cases the standard is higher. The risk of death
13 must be substantial and unjustifiable.

14 And then Paragraph L says the meaning of
15 "gross deviation." A gross deviation from the
16 standard of conduct is one that may be
17 characterized by such terms, among others, as
18 flagrant, extreme, outrageous, heinous, or
19 grievous. The deviation from reasonable conduct
20 must be significantly greater than the mere
21 inadvertence or heedlessness that is sufficient for
22 civil negligence.

23 This is your decision. Was Mr. Ray's
24 conduct inadvertent? Was it heedless, or was it
25 outrageous, heinous, or grievous?

1 By Mr. Ray's own words, he intended to
2 create something that was extreme. His conduct was
3 flagrant. All this testimony that you heard is
4 testimony of his intent. He intended to create
5 this extreme event, and he did. Clearly his
6 conduct is a gross deviation from what a reasonable
7 person in that situation does or how a reasonable
8 person in that situation acts.

9 You've gotten a chance to learn a little
10 bit about Kirby, about Liz, and about James during
11 this trial, enough to know that there is no way
12 they exercised any kind of free choice to stay
13 inside the tent until they died. Not a single one
14 of them exercised any, any, free choice as they
15 were struggling and falling unconscious inside that
16 tent and left alone by Mr. Ray there.

17 You learned that Liz lived in Minnesota.
18 Melinda Martin described Liz as full of life and
19 joy and told you how she had spent part of
20 Wednesday when the participants were on the Vision
21 Quest in Sedona with Liz, where they had their hair
22 tinsel and they both bought matching rings.

23 Laura Tucker and others told you about
24 how much comfort Liz brought to them as they began
25 Mr. Ray's sweat lodge, coaching them with tips on

70

1 how to bear the heat.

2 Kirby Brown, as you learned, was an
3 artist, a painter, who lived in Cabo, Mexico, who
4 had made plans with Dawn Gordon to visit Dawn in
5 Las Vegas and paint a mural on one of the interior
6 walls at Dawn's house.

7 Beverly Bunn, Kirby's roommate, described
8 Kirby as on top of the world and ecstatic about
9 going through this event.

10 Melinda Martin led Kirby to her spot for
11 the Vision Quest, describing her then as shaken.
12 But when Melinda retrieved her 36 hours, Kirby had
13 decorated her medicine wheel.

14 And James Shore, you learned, was from
15 Milwaukee. According to Lou Caci, James was an
16 open-minded, spiritual kind of fellow who spent
17 time during the week working on a business proposal
18 for a client.

19 On Sunday, Mr. Shore took the open mic
20 and told the group his intention for the week.
21 That clip was played for you during this trial for
22 the limited purpose of understanding James Shore's
23 state of mind and conduct inside the sweat lodge as
24 well as Mr. Ray's knowledge of Mr. Shore's state of
25 mind. And I'm going to play that clip again for

1 you for that same purpose.

2 (Audio played.)

3 MS. POLK: You heard Mr. Shore's own words,
4 his intention to live impeccably. I suggest he
5 knew that Mr. Shore's actions in that sweat lodge
6 during those last two rounds was living impeccably.
7 And what a contrast between teacher and student.

8 Mr. Ray, who sat there while all this was
9 going on with full knowledge of what was going on
10 in the back of the tent consciously disregarding
11 the risk of death that his conduct created. And
12 Mr. Shore, on the other hand, struggling himself to
13 survive, yet taking care of those around him.

14 On the sixth round on, through this
15 testimony, you have learned what Mr. Shore did and
16 what Mr. Ray did not. Again, what a contrast
17 between teacher and student.

18 You heard how Mr. Shore becomes aware of
19 Sidney Spencer, unconscious, described by witnesses
20 as lifeless, how Mr. Shore, who is struggling
21 himself, drags her out to the entrance, right where
22 Mr. Ray is, bumps his head, has that opportunity to
23 get out himself, has that opportunity to get out
24 into the fresh air and be with us today.

25 And what does he do? He's aware that

72

1 somebody else is in trouble in the back of that
2 tent. So at the entrance, he turns around and he
3 goes back into that dark area in the back where
4 there is no air. He goes back after the sixth when
5 the door is still open and he calls out for help,
6 and he doesn't get it.

7 So then he and Dawn take care of Kirby,
8 move her to her side. And you heard Dawn describe
9 how Mr. Shore -- how sweet he was, talking to
10 Kirby, trying to help her through, trying to keep
11 her alive throughout that seventh round.

12 And then that round comes to an end.
13 And, again, James Shore calls out for help, we need
14 help over here. And, again, how Mr. Ray, hearing
15 those words, says, the door is closing.

16 And you heard more testimony about James
17 Shore trying to keep Kirby alive, again, talking to
18 her, lifting up the flap, one last desperate
19 attempt to stay alive and how he gets yelled at for
20 this light coming in. And so weakened and his
21 state clearly altered obeys and puts down the flap.
22 And things grow silent, and 15 minutes later or so,
23 they're both pulled out at that point without a
24 heartbeat.

25 The opportunity to reverse course was

1 there throughout this event. Why did Mr. Ray not
2 stop? Time after time, again, he had information
3 that people were not doing well, and he chose not
4 to stop. Time and time again he chose to continue
5 on, to ignore information that he had about people
6 suffering. And he chose to bring in more rocks,
7 bring in more water, create more heat, and create
8 more steam.

9 Death was not inevitable. Death did not
10 have to occur in this case. That's why the
11 information about Sidney Spencer is so crucial.
12 That was the turning point. And how different it
13 would be if when Sidney Spencer was dragged out
14 after the sixth right in front of Mr. Ray he had
15 just stopped this event then.

16 Ask yourselves why he did not. And in
17 that answer lies the evidence as to why Mr. Ray is
18 guilty beyond a reasonable doubt of reckless
19 manslaughter. He did not because this is what he
20 wanted. He wanted this extreme altered state.
21 This is what he sold to participants for \$10,000.

22 The Judge told you about the verdict, the
23 forms you will get. I just want to show them to
24 you. This one pertains to Kirby Brown. And you
25 will get these when you go back. And as you can

1 see, those are the three options you have:

2 We, the jury, duly empaneled and sworn in
3 the above-entitled action, upon our oaths do find
4 the defendant, James Arthur Ray, on the offense of
5 the manslaughter as a result of the death of Kirby
6 Brown, and you've got three options: not guilty,
7 guilty, or unable to agree.

8 If you find him not guilty -- you start
9 with the manslaughter. And if you find him not
10 guilty of manslaughter or if you are unable to
11 agree, then you move on to the lesser offense of
12 negligent homicide. And then, again, unanimously
13 you must agree either guilty or not guilty.

14 I suggest to you that the evidence in
15 this case has proven beyond a reasonable doubt that
16 Mr. Ray is guilty of the crime of reckless
17 manslaughter.

18 Again, the state does not have to prove
19 that Mr. Ray personally knew that Kirby, Liz, or
20 James was dying. We do have to prove that Mr. Ray
21 was aware of and consciously disregarded all that
22 information, that risk that his conduct would cause
23 death.

24 The evidence in this case, ladies and
25 gentlemen, does prove beyond a reasonable doubt

1 that Mr. Ray committed the crimes of manslaughter,
2 and I ask that you find him guilty of all three
3 counts.

4 Kirby, James, and Liz all arrived at
5 Angel Valley full of hope and life. But when
6 Mr. Ray took it upon himself to do this extreme
7 event, when Mr. Ray intentionally used heat to
8 create an altered mental state, telling
9 participants to push through the pain in order to
10 have a breakthrough, Mr. Ray senselessly and
11 recklessly snuffed out the lives of Kirby Brown,
12 James Shore, and Liz Neuman.

13 Members of the jury, that is what the
14 crime of manslaughter is all about, recklessly
15 causing the death of another.

16 Thank you.

17 THE COURT: Thank you, Ms. Polk.

18 Mr. Li.

19 MR. LI: Thank you, Your Honor.

20 We need to switch the computers.

21 THE COURT: Let's take a -- about a 10-minute
22 recess, then.

23 MR. LI: Thank you, Your Honor.

24 THE COURT: Ladies and gentlemen, now remember
25 the admonition. Again, all aspects continue to

1 apply. Thank you.

2 (Recess.)

3 THE COURT: The record will show the presence
4 of Mr. Ray, the attorneys, the jury.

5 And, Mr. Li.

6 MR. LI: Thank you, Your Honor.

7 Good morning, ladies and gentlemen. I've
8 got to tell you, as I sat through this trial, as I
9 sat through yesterday's argument, and as I sat
10 through today's argument, I got pretty fired up.
11 As the state repeatedly accused us -- Mr. Kelly,
12 myself, Ms. Do -- of misleading you, of feeding you
13 baloney, of misrepresenting the facts during the
14 trial.

15 I had a reaction. And I wrote a lot of
16 it down, page after page. While Ms. Polk said that
17 I misrepresented the record. Well, that's not
18 actually what happened, and I wrote down what I
19 thought. I've got pages of this stuff.

20 You know what I realized? What I know is
21 it's not about me. It's not about me. It's not
22 about Mr. Kelly. It's not about Ms. Do. It's not
23 about what Ms. Polk thinks -- she thinks the
24 evidence shows. It's not about whether she thinks
25 we're misrepresenting something or feeding you

1 baloney. This is about you, each and every one of
2 you.

3 At the beginning of this case, you will
4 probably remember this. I told you that our
5 Constitution and our system is a promise that our
6 founders made to all of us, and that promise was
7 that this would be a nation of laws and that those
8 laws would do what. They would limit the
9 government.

10 So how do we limit the government? Do we
11 give the power to the politicians? the police?
12 Even to the Judge? No.

13 The power is given to you, each and every
14 one of you. That's what our system is. And there
15 is a reason why every time you walk into this
16 courtroom, they give notices. Every single time
17 you walk into this courtroom, every single time you
18 stand up, we all stand up too. That's out of
19 respect for you and the role you play in this
20 system.

21 You're the most important people in this
22 courtroom today. And your job, as it has been
23 throughout this trial, is to follow that oath you
24 made at the beginning of this trial to follow the
25 law.

1 And you'll remember at the beginning of
2 this trial, Mr. Kelly picked up this big blue book,
3 and I waived it around too. This is the
4 Constitution of the United States and the laws of
5 Arizona. That is what you have promised to follow.
6 To not be moved by prejudice or sympathy or
7 assumptions or hearsay or anything but the law.
8 And you will be guided throughout this case, as you
9 have, by two simple principles, and that's all I
10 ask of you.

11 I don't ask you to think, oh, Mr. Li is a
12 great guy. I don't ask for any of that. All I ask
13 is that you follow two simple principles: The
14 truth and the law. That's it. The truth and the
15 law. You, each and every one of you, you keep the
16 promise our founders made to all of us.

17 Now, before I go further, I got to do
18 something that hasn't been done. I've got to thank
19 you, each and every one of you, for your service.
20 You've been here for four months. That's hard
21 duty. You've been here for four months, paid
22 attention. You've had good humor, been good
23 natured. You've been patient. And we appreciate
24 that. We appreciate that from the bottoms of our
25 hearts, all of us. We appreciate the service that

1 you are doing today and that you have done for the
2 last four months.

3 Mr. Kelly likes to remind me that other
4 than serving in the Armed Forces where you defend
5 the Constitution of the United States against
6 foreign enemies, serving in the jury is perhaps the
7 most important civic duty you can do because you
8 defend the Constitution here.

9 And so it's been an honor and a
10 privilege, a deep privilege for me and all the
11 folks on the team to stand in front of you. A deep
12 privilege.

13 Now, ladies and gentlemen, I'm here to
14 tell you that there is something -- there is
15 something profoundly wrong with this case. There
16 is something profoundly wrong with this case. I
17 want you to think about what it means in these
18 United States to brand someone a criminal. I want
19 you to think about what it means for the government
20 to brand somebody a criminal, what it takes and
21 what it means.

22 I want you to think about how this case
23 has been presented to you by the government. I
24 want you to think about those things, and I want
25 you to look into your hearts and into each of your

1 souls and ask yourselves, is this what I want? Is
2 this how I want the system to work? Because,
3 ladies and gentlemen, you are going to decide if
4 this is how you want the system to work.

5 And what do I mean by that? Well, let me
6 give you some examples. Yesterday and today, again
7 and again the prosecution suggested that the
8 defense had to prove to you or provide evidence
9 about toxins. Now, you remember that. Where is
10 the evidence? The defense has put us in the
11 position that we have to now disprove a negative.
12 That's not the law.

13 The defense doesn't put you into any
14 position. The Constitution, the laws, that book,
15 that's what puts you in a position. It's the law.
16 And that's why the Judge yesterday and this morning
17 had to instruct you again as to what the burdens of
18 proof are again. And it's not the first time.

19 In fact, the Judge had to instruct you,
20 as the Judge has instructed you before, in the
21 middle of a cross-examination -- of the examination
22 of Detective Diskin where they were asking
23 questions about why didn't you know about the
24 organophosphates?

25 A defendant is always free to challenge

1 the sufficiency of the evidence with respect to an
2 element upon which the state bears the burden of
3 proof even without any advance notice or intent to
4 do so.

5 The Court had to instruct you of that
6 on -- the date's wrong there. It was actually
7 April 29. And the Court also had to instruct
8 you -- this is the instruction. You heard
9 testimony this morning and yesterday regarding when
10 and how the defendant -- or sorry -- the detective
11 learned about information related to possible
12 organophosphate poisoning. Do you remember that?

13 And then the Court said, in considering
14 this information, you must remember that the
15 prosecution has a burden of proof to prove all
16 elements of the crimes charged beyond a reasonable
17 doubt. And the Court also gave that instruction.

18 And you know what. The Court had to give
19 the instruction again this morning. Why is that?
20 Why is that? Because what the state has suggested
21 is wrong. It's not our laws. And so the Court has
22 to intervene and talk to each and every one of you
23 and remind you of actually how the system works and
24 what the rules are.

25 Why do we have to be interrupted?

1 Because what the state has been doing is wrong.
2 It's just wrong. And it infects every aspect of
3 this case. It's a symptom of what's wrong in this
4 case. And that's what I'd like to talk to you
5 about today.

6 We're going to talk about three things.
7 They're the same three things that I talked to you
8 about on March 1st of 2011 when we started this
9 case together.

10 The first is what the government's theory
11 is about conditioning, about conditioning, about
12 choice, and what folks can and can't choose and how
13 far the government is willing to stretch the
14 evidence to show you, to suggest to you, that
15 adults can't choose for themselves.

16 Yesterday you heard again and again and
17 even today you heard that participants were
18 conditioned to ignore their own bodies, one, and to
19 not help other people out. There is a lot more,
20 and I'll talk about it after lunch. But those are
21 two points I want to make to you right now. The
22 government again and again talked about those
23 points.

24 You heard -- I just want to suggest to
25 you something. Yesterday you heard a tape. It

1 lasted about, I don't know, 30 minutes. It's how
2 we ended the session yesterday. You heard a tape.
3 And that's the best evidence of what actually
4 Mr. Ray said.

5 All this sort of arguments that Ms. Polk
6 makes about, well, he told people to ignore their
7 bodies, et cetera -- actually, the tape that you
8 heard and that you will have -- I think it's
9 Exhibit 747 -- 741 -- that exhibit you will have
10 and you can listen to it yourself. That's the best
11 evidence. But you did hear it yesterday.

12 What did you hear? For about 30 minutes
13 to close the day yesterday, what you heard was
14 Mr. Ray saying, if you can't take it, if it gets
15 just too hot, you should -- I think you can do it.
16 I think you can do it. But if it gets too hot, you
17 got to leave. Leave. Here's how you do it. Go
18 around so you don't stumble into people. It's
19 dark. It's dangerous in there. There is a big,
20 hot pit in the middle. Just go out.

21 That's what you actually heard. So you
22 can spin it any way you want. But that's the
23 actual evidence.

24 The other thing you heard -- and this is
25 another point. Remember, the government says

1 Mr. Ray says, oh, you know what. Don't help
2 anybody out. You heard the tape. Here's what he
3 said. There is two ways to be. Two ways. You can
4 be me, me, me. I'm paraphrasing I think He says,
5 you can be think of me, or you can be think of me
6 and others. I suggest you be the second. I
7 suggest you be the kind of person who helps other
8 people out. That's what the actual tape says.
9 Stripped of all the rhetoric, the spin, the
10 arguments, the stretching, that's what the actual
11 evidence says.

12 How far is the government willing to
13 stretch the facts? You need to ask yourself that
14 when you listen to these arguments and when you've
15 listened to this trial.

16 The second thing I want to talk to you
17 about is that the medical evidence, the medical
18 evidence for the state failed. It's the state's
19 burden to show that a toxin didn't kill somebody,
20 beyond a reasonable doubt. It is not the defense
21 who has any burden at all to build, quote/unquote,
22 a house of cards. There is no burden at all.

23 So what we're really here to talk about
24 is has the government proven beyond a reasonable
25 doubt, excluded the possibility that something else

1 was happening? That's what we're really talking
2 about.

3 Okay. Are we clear? That's the
4 Constitution. That's our system. That's what each
5 and every one of you would want. If you, friend,
6 kid, anybody were sitting in Mr. Ray's chair,
7 that's what you want.

8 And yesterday you heard the state say the
9 most incredible thing. Dr. Paul, Dr. Paul, who you
10 saw testify, Dr. Paul who is a state medical
11 examiner for the State of New Mexico who works with
12 the police and with the prosecutors -- you heard
13 the state say, he has no credibility at all. I
14 wrote it down. No credibility. No credibility at
15 all.

16 This is the same guy, by the way, that --
17 you will recall Dr. Mosley. Remember Dr. Mosley
18 from Flagstaff, the Coconino County Medical
19 Examiner? He said, this guy's resume is
20 impeccable. And I'll talk about that in a second.
21 It is impeccable. That's what he said. And he
22 said that after reading Dr. Paul's report, he had
23 to rethink his conclusions. I'll read to you
24 exactly what he said after lunch.

25 But this is the same person, a state

1 employee that the government works with and
2 prosecutes people in the State of New Mexico, that
3 the government wants you to believe has no
4 credibility at all.

5 And one really amazing fact -- and I
6 don't have it available. But remember that
7 Ms. Polk made a big point about some symptoms that
8 Dr. Paul had put up here for all the various
9 patients. And she made a big point, and she said
10 it was glaring, glaring, that the circumstances in
11 which they were found was not put up there. And it
12 just shows how bias it is. Glaring that he didn't
13 put up the fact that they were found in a sweat
14 lodge and that glaringly shows that he's bias or
15 that he has no credibility at all, at all.

16 I'm going to read to you the actual
17 questions that Mr. Hughes asked him to do. Okay?
18 This is what he actually asked him. Let's go
19 through with Ms. Brown. Can you tell me -- why
20 don't you write on the easel, if you would. Can
21 you list for me the different signs and symptoms
22 you believe Ms. Brown displayed that were
23 consistent with organophosphates poisoning but not
24 consistent with heat stroke?

25 So what, basically, happened is

1 Mr. Hughes asked Dr. Paul, hey, put everything that
2 supports your conclusion here. Okay? Put
3 everything that supports your conclusion here. And
4 that's what you got. But now the state wants to
5 tell you, well, that's glaring because he didn't
6 put things that don't support his conclusion up
7 there.

8 You don't do that in our system. You
9 know, the government doesn't do that in our system.
10 It's not supposed to.

11 The second thing is you heard -- we had
12 to repeat that the burden of shift -- burden of
13 proof never shifts to Mr. Ray, the defendant.
14 Mr. Ray is never -- is not required to produce any
15 evidence at all.

16 Here's what the state's supposed to do,
17 and this is your own instructions. Right here.
18 You have a copy. You will take it back. So you
19 don't have to rely on the PowerPoint. You just
20 read your own instructions.

21 The state must prove beyond a reasonable
22 doubt with its own evidence. Okay? Not the
23 defense evidence. It's your own evidence. So,
24 like, if you have a bunch of -- if you have medical
25 records and you don't look at them, that's the

1 government responsibility. If you have a tape of
2 some guy talking about organophosphates, that to
3 this day Ms. Polk will not acknowledge despite the
4 fact that you had testimony that he was an EMT.
5 Okay?

6 To this day the government won't
7 acknowledge the guy was an EMT. So if you have
8 evidence of an EMT, Exhibit 742, at that tape,
9 coming in and saying -- you know -- we think there
10 is some carbon monoxide with maybe some
11 organophosphates mixed in, you've got a tape of
12 that guy on the night of the accident, and you've
13 got a ton of medical records, and you don't look at
14 them, and you're the government, and you don't even
15 know about that tape until I play it, until the
16 defense plays it in opening statement, I have got
17 to tell you, there's something wrong.

18 There is something really wrong because
19 Mr. Ray is standing here accused of a crime of
20 manslaughter, killing people, and these folks have
21 not even looked at their evidence yet. They don't
22 know. That's not how our system works. And you
23 know what, it's not just me saying this. Okay?
24 It's the law.

25 This is another one of your instructions.

1 If you find that the state has lost, destroyed, or
2 failed to preserve evidence whose contents or
3 quality are important to the issues in this case,
4 then you should weigh the explanation, if any,
5 given for the loss or unavailability of the
6 evidence.

7 If you find -- this is -- you've got it
8 in your package there. If you find that any such
9 explanation is inadequate, then you may draw an
10 inference unfavorable to the government -- or to
11 the state -- excuse me -- which in -- in itself may
12 create a reasonable doubt as to the defendant's
13 guilt. That's the law. That's the exact law that
14 you've sworn to uphold. That's not me. That's
15 your jury instructions. That's the instructions
16 given by this court.

17 Here's something we know. We'll talk a
18 lot more about this later, but here's what we know:
19 The government did fail to preserve evidence.
20 Okay? We know that. For one, blood from the night
21 of the accident. No. 2, a plethora, a truckload,
22 of evidence that the Hamiltons had. We know that.
23 It was important.

24 You know what. What if we had a blood
25 sample right now they took on the night of the

1 accident because they could have? What if they
2 submitted it and it says organophosphate poisoning?
3 What are you doing charging Mr. Ray?

4 So it is important. And there is no
5 explanation. Well, we didn't look at it. That's
6 the explanation. The law provides, unlike what
7 Ms. Polk is suggesting, that this lack of evidence
8 cannot be held against Mr. Ray. That's not what
9 the law is.

10 The lack of evidence can be held -- it
11 can be considered unfavorable to the state, and in
12 and of itself, it can be reasonable doubt, in and
13 of itself.

14 Why? Why do we have laws like that?
15 Because that's how we want our government to work.
16 We expect a lot out of our government. We don't --
17 close enough -- you've heard the phrase "close
18 enough for government work." It is not close
19 enough in a criminal case. It is not close enough
20 when you're talking about subjecting a man to the
21 criminal justice system. That is not what our
22 system provides.

23 Our system doesn't allow the government
24 to brand somebody a criminal, subject him to four
25 months of trial, destroy or fail to preserve

1 evidence, and then demand that this man prove to
2 you that he isn't a criminal. Can you imagine if
3 you were in that circumstance? That would be
4 wrong. And that's why the Court had to step in
5 this morning and yesterday and correct, correct,
6 what the prosecution was suggesting. It's wrong.

7 The third way this case is wrong is that
8 the government has not proven beyond a reasonable
9 doubt that Mr. Ray or anyone knew that people were
10 dying. You heard from dozens of witnesses. There
11 were 50 people in that sweat lodge, including
12 people sitting right next to them, right next to
13 them, touching them, and they didn't know. They
14 just didn't know.

15 And you've heard the government suggest,
16 well, Mr. Ray came out and he was callous and he
17 sat down and he towed himself off. He had a
18 drink of water. And that shows actually that not
19 only did that he know, but that he intended all
20 these things to happen.

21 No. It actually shows exactly the
22 opposite. It shows a guy who had no idea the
23 tragedy that was striking just as people who were
24 sitting right next to the people who passed away.
25 Laura Tucker. Okay? Laura Tucker right next to

1 Liz Neuman.

2 Dawn Gordon. You remember Dawn Gordon.
3 I stood right next to her at this -- at this
4 witness stand, witness box, and we showed how close
5 they were -- she was to people. She was right next
6 to Kirby Brown and about this far, give or take,
7 from James Shore. She saw them talking. She saw
8 James Shore talking all the way into the eighth
9 round saying sweet things. She didn't know.

10 Even those witnesses who have brought
11 lawsuits, have gone to the media, have done all
12 sorts of things, even those witnesses admitted they
13 didn't know. Of course, they didn't know.

14 Do you remember at the beginning of the
15 trial I asked you, what would you do? What would
16 you do if you knew that the person next to you was
17 dying? What would you do? Remember that? I asked
18 you guys that. What would you do? You would help
19 the person?

20 Okay. You've been conditioned in this
21 courtroom to listen to what the Judge says. The
22 Judge says, hey, you -- you know -- the bailiff
23 says, Heidi says -- you know -- come in. This time
24 you come in. Leave that way. You leave in this
25 order. This is how you go. Okay?

1 If you knew the person next to you was
2 dying, you'd stop this ceremony, this procedure
3 immediately. You would say, hey, we've got a
4 problem here. We need to stop now. I mean, if
5 people didn't understand you, Ms. Rybar didn't
6 understand you, you'd say, hey, we've got to stop.

7 But the government says these folks were
8 conditioned not to do that because Mr. Ray yelled
9 at them. That's just not -- that's just failed
10 common sense. That's just not -- that's not how
11 people work. You saw these folks. You saw a lot
12 of them.

13 Now, other than the people who have
14 lawsuits and who are saying -- you remember
15 Ms. Gennari. And I'll talk about her in a bit.
16 Okay? But other than the people who have lawsuits
17 and said that -- you know -- there was mass
18 hypnosis or the vegetarian diet knocked me off
19 balance and I couldn't make choices anymore, other
20 than those people, everybody out there -- you bet.
21 I'm a stockbroker. I'm a former helicopter pilot
22 and a marine. You know, I'm an accountant. I'm a
23 dentist. I'm a whatever. I'm a professional. I
24 am not a robot.

25 You heard those folks. And that's what's

1 wrong with this case, and that's what I'm going to
2 talk to you about after lunch.

3 Now, one really, really, really important
4 thing I want to mention to you, you heard
5 throughout the government's opening statement
6 conversations about Mr. Ray, the defendant, did
7 this. The defendant said that, and then the
8 defendant did this.

9 Mr. Ray has a name. His name is James
10 Arthur Ray. And he's been sitting here before you
11 for the last four months with his fate in the
12 government's hands and now in your hands. And if
13 you think there's something -- if you don't think
14 there is something wrong with this, you don't think
15 that there is a problem with the prosecution not
16 relying on evidence, but leaving the pictures of
17 the folks who have passed away up on the screen for
18 11 minutes has nothing to do with the crime --

19 And I am not saying -- I mean, at the
20 very beginning, at the very, very beginning of this
21 case, I talked to you. And the very first thing I
22 said was there is nothing anybody -- me, the Court,
23 Ms. Polk -- anybody can say that will take away the
24 tragedy. There's nothing. And I'm not trying to.
25 It is a tragedy.

1 But when you leave pictures of folks who
2 have passed away and you talk about how they wanted
3 to paint murals and all of those things, you're
4 doing -- as the government, you're appealing to
5 sympathy and prejudice, which your instructions,
6 ladies and gentlemen, explicitly tell you you
7 cannot consider. Listen, they tell you, you cannot
8 do this. So why are they doing it? Why are they
9 doing that?

10 I mean, if you don't think that's wrong,
11 you don't think there is a problem with that, then
12 imagine yourself, anybody you love, anyone you
13 know, anybody, imagine yourselves sitting in
14 Mr. Ray's chair.

15 I think we're going to break for lunch.
16 But before we break for lunch, I want you guys all
17 to ask yourselves, is this what you want? Is this
18 what you want from your government? Is this how
19 you want your government to be? Because it's going
20 to be up to you.

21 Your Honor, if we may break for lunch
22 now?

23 THE COURT: Thank you, Mr. Li.

24 Ladies and gentlemen, we will take the
25 noon recess. And remember the admonition, all

1 aspects. You cannot discuss the case among
2 yourselves until the case is presented to you at
3 the end of the trial. Remember all aspects of the
4 admonition.

5 I do -- I understand now that you've had
6 the substituted amended page 8.

7 And you are excused for the recess.
8 Please return at 1:30.

9 And I want the parties to stay a minute.
10 Please. Thank you.

11 (Proceedings continued outside presence
12 of jury.)

13 THE COURT: Thank you. Please be seated.

14 The record will show that the jury has
15 left the courtroom.

16 I'll address Mr. Hughes, Mr. Kelly, and
17 Ms. Seifter. And just please look over that
18 amended page 8 very carefully so that -- you
19 know -- the unusual situation isn't compounded.
20 Read through it all and make sure it's accurate.

21 Thank you.

22 MS. POLK: Your Honor --

23 THE COURT: Yes.

24 MS. POLK: -- may I raise a brief issue while
25 we're present?

1 THE COURT: Yes.

2 MS. POLK: Your Honor, I believe that Mr. Li's
3 comments have been highly improper when he has
4 suggested to the jury that your giving of a
5 limiting instruction somehow places behind his
6 argument the weight of the Court.

7 He is arguing to the jury very openly,
8 very blatantly, and very inaccurately that the
9 state engaged in misconduct. And then he said
10 that, in fact, the Judge had to instruct you as the
11 Judge had to before, the following. That is highly
12 improper. That is gross misconduct, Judge. And
13 that is taking the weight of this Court and placing
14 it behind Mr. Li's arguments.

15 He has gone overboard. We argued about
16 this this morning. And then he turned around and
17 stood up in front of the jury and took out of
18 context your instructions, gave them weight that
19 they did not have.

20 And, Judge, this is very similar to what
21 Mr. Kelly did in cross-examining Detective Diskin
22 and in front of the jury telling the jury that we
23 had had a five-day delay because of the state's
24 misconduct and that the Court had sanctioned the
25 state.

1 None of that information should have come
2 in front of jury then. I asked for a limiting
3 instruction then. But for Mr. Li now to take
4 instructions and not just argue instructions but
5 argue that he has the weight of this Court's
6 authority behind his theory of the case is highly
7 improper.

8 And I would ask that the Court when we
9 come back give a limiting instruction to the jury
10 to make them understand that they are not to infer
11 that your giving of instructions at any time
12 suggests that the state has acted improperly or has
13 engaged in any misconduct. Because that is exactly
14 what Mr. Li is arguing using the weight of the
15 authority of this Court.

16 THE COURT: Mr. Li.

17 MR. LI: Your Honor, it also happens to be the
18 truth. It also happens to be the truth that the --
19 I will step out of argument mode. But it happens
20 to be exactly what this Court has done.

21 It is a fact that the government
22 committed a Brady violation in violation of
23 Mr. Ray's constitutional rights. It is a fact.
24 That happened.

25 It is also a fact that throughout the

1 state's argument yesterday, the government
2 improperly burden shifted. It's not just enough to
3 say, oh, well, here. We got to tell you what the
4 law is. The government is not actually fulfilling
5 it's obligations, it's ethical obligations, to
6 prosecute this case fairly and correctly.

7 So it is a fact that this Court has to
8 step in and correct that record. That's a fact.
9 And it is fair argument to suggest, to tell this
10 jury, that the way the government presented its
11 case yesterday is, in fact, incorrect and a
12 misstatement of the law.

13 There will be other misstatements of the
14 law that I will argue in my closing arguments,
15 Your Honor. We have every right to correct the
16 record and to make sure this jury understands that
17 what Ms. Polk, with all the weight of the
18 government behind her -- see, that's the problem.
19 Ms. Polk is the elected county attorney. She has
20 all the weight of the government behind her.

21 The reality is that she cannot vouch
22 because she has -- she comes with the seal of
23 Arizona next to her.

24 We don't have any seal of Arizona next to
25 us. We're just defense attorneys trying to protect

1 Mr. Ray. It is entirely proper that I call the
2 government out on what it argues in front of this
3 jury. Because what the government argues in front
4 of this jury is not only misconduct, it's not only
5 grounds for a mistrial, which we had moved for
6 yesterday, but it's also incorrect and misleading
7 to this jury. We have every right to make that
8 argument.

9 THE COURT: Ms. Polk.

10 MS. POLK: Your Honor, Counsel can argue who
11 has the burden of proof. They cannot argue that
12 the Court's actions in giving an instruction placed
13 the weight of the authority behind their argument
14 of misconduct or that I had done something
15 improper.

16 I made the record this morning as well as
17 yesterday. I did not say to this jury that the
18 defendant had to provide the evidence to the state.
19 I never said that. And I've made the record clear
20 that I was explaining the Willits instruction, as
21 we're entitled to do.

22 Mr. Li has gone far beyond -- point-blank
23 said to this jury that I suggested that Mr. Ray had
24 to provide evidence to the state, and then he went
25 on to say, the Judge had to instruct you, as he had

1 to before, placing the weight of the authority of
2 this Court behind that argument.

3 It is so misleading and so improper to
4 let this jury believe that this Court found
5 something wrong with my argument and to let them
6 believe that on other occasions when we read
7 limiting instructions, there was something improper
8 about what I was doing. That should not happen.

9 Mr. Li has gone way beyond, way beyond,
10 anything appropriate. He can argue burden -- who
11 has the burden of proof. What he cannot argue that
12 when the Court gave instructions that the Court was
13 telling this jury that the state had engaged in
14 misconduct. And that is exactly what he has said
15 to them.

16 MR. LI: They have engaged in misconduct, Your
17 Honor. This is -- for one, this is not just a
18 limiting instruction. This is an instruction --
19 this is an instruction about the burden of proof,
20 which the state shifted improperly, which is a
21 constitutional violation. That's the problem.

22 MS. POLK: Your Honor, again, I would request
23 that you give a limiting instruction to this -- to
24 this jury that they are not to infer that by your
25 reading instructions to them that you are

1 suggesting that the state has acted improperly
2 because that's exactly the argument Mr. Li just
3 made to them.

4 MR. LI: Your Honor, it cannot be the case
5 that the state gets to commit constitutional
6 violations. And then -- you know -- if the Court
7 can just maybe correct a little bit on the edges
8 and we'll just tell them that -- you know -- the
9 burden is actually this.

10 It cannot be that the government can
11 intentionally commit constitutional violations,
12 including -- or recklessly, including the Brady
13 violation, and then there be no consequence to
14 Mr. Ray who is on trial for his life right now. It
15 cannot be.

16 Throughout this case, as Mr. Kelly has
17 said over and over and over again, from the
18 beginning of this case, the state has tried to
19 stretch every possible advantage it can find
20 cumulatively over and over and over and over and
21 over again, violation after violation.

22 It cannot be that the state can do this
23 and that we can't -- that there is no consequence
24 at all.

25 THE COURT: Many of the points were quite

1 close in what is a comment about available
2 evidence, testing of evidence, and that versus
3 actually suggesting that there is a burden on the
4 other side -- on the defense, which there is not.

5 And I found the appropriate thing to do
6 was just to remind the jury of what the law is. I
7 think these are the correct statements of the law.
8 It didn't get to a point, other than in the Brady
9 context, of me actually finding a constitutional
10 violation.

11 I recall -- I believe I said that the
12 sanctioning -- the mention of the sanction was not
13 supposed to happen. Wasn't that the ruling? But
14 it did. And then there was an objection. And I --
15 it probably would have been sustained because I
16 remember talking about that before, so mentioning
17 the sanction and letting the jurors know that.

18 MR. KELLY: Your Honor --

19 THE COURT: Mr. Kelly.

20 MR. KELLY: -- you're correct. I asked a
21 question, which I still believe is proper, after a
22 litany of questions regarding -- or relating to the
23 nondisclosure of the Haddow report and the delay in
24 the trial. It was Detective Diskin's
25 cross-examination. My final question was, and the

1 state was sanctioned? There was an objection, and
2 it was sustained.

3 THE COURT: I don't think it is appropriate,
4 though, to put the Court behind some kind of
5 finding I might have made outside the courtroom and
6 then -- and let the jury know that somehow I have
7 some feeling of disfavor. I gave the instruction
8 that I felt would correct the problem. And I agree
9 there needs to be some kind of, again, instructions
10 to get things back on track.

11 Mr. Li, I'm not trying to curtail
12 argument any more than Ms. Polk. I understand. To
13 say that the Court had to do something because the
14 Court shared a particular view, that's something
15 I'm not -- I confronted.

16 MR. LI: I did not say that the Court shared a
17 particular view. I said that the law had to be
18 clarified to this jury because the prosecution had
19 shifted the burden, which is improper. It is
20 misconduct, Your Honor.

21 I -- you know -- I'm not going to say
22 this argument in front of jury because I told you I
23 wouldn't. I was a prosecutor for 10 years. I
24 supervised 300 of them when I was in Los Angeles.
25 And if somebody got up there and made the burden

1 shifting argument that I heard yesterday, they
2 would be on administrative leave.

3 That is improper. It is misconduct. If
4 you are at the U.S. Attorney's Office and you did
5 that, people from the Office of Professional
6 Responsibility in Washington, two of them, would
7 come out and investigate you. So it is a fact that
8 you cannot do that. That is the law.

9 And it cannot be that the state gets to
10 do this without any consequence at all. All I did
11 was suggest to this jury that what the government
12 said was incorrect, that it was a misstatement of
13 the law.

14 I'm going to say it again, Your Honor.
15 It is a -- the government has misstated the law.
16 It is actually the law. I mean, I'll give you one
17 example that I'm going to mention this afternoon.
18 It is actually the law that the government has to
19 prove beyond a reasonable doubt that folks knew
20 people were dying, not just that there was a
21 substantial risk, period, which is what the
22 government keeps on saying. We have to prove
23 beyond a reasonable doubt that there was a
24 substantial risk, period.

25 That's not -- I mean, it's too clever by

1 a half. It's that there was a substantial risk
2 that the conduct would cause death. And that is
3 just improper again and again and again,
4 Your Honor. It is our duty -- it's just absolutely
5 our right to put this government to its proof and
6 to make this government follow its rules.

7 THE COURT: Ms. Polk.

8 MS. POLK: Your Honor, more than once, Mr. Li
9 said to the jury that Ms. Polk suggested that the
10 defendant had to provide the evidence to the state
11 and this judge had to instruct you, as he had to
12 before, putting -- improperly putting behind that
13 instruction authority and implying to the jury --
14 well, actually more than implying, telling the jury
15 that this court had found misconduct.

16 I request the opportunity to draft and
17 present to the Court a limiting instruction because
18 it is clearly improper that Mr. Li has suggested to
19 this jury that you found wrongdoing and put the
20 weight and authority of this Court behind what he
21 is saying right now.

22 THE COURT: Mr. Li, the statements you've made
23 would imply that there would be such a strong
24 grounds for mistrial at this point. And what
25 you've indicated would be the ramifications, in

1 your experience, would indicate to me that you
2 would have the appropriate law. And it's just at a
3 mistrial point anyway. I mean, you're, basically,
4 telling me that I have not -- well, if I'm
5 presented with a mistrial, I'd have to grant it.

6 MR. LI: Well, we moved on that yesterday,
7 Your Honor. As the Court will recall, we listed
8 some half a dozen violations and did move for a
9 mistrial, which this Court denied. And we
10 understand. And we were making that for the
11 record. And so we did file that. We did --
12 sorry -- move for a mistrial.

13 We also did file with this Court our
14 authority on prosecutorial misconduct and what
15 arguments are permitted and what aren't permitted.
16 I know -- I know for a fact you cannot ever say "we
17 know" as a government lawyer. You can never say
18 that. You know, we pointed that out in our brief.
19 And the government just locked into that.

20 Now, I'm going to say that I would bet
21 you if you looked at the notes, it still says "we
22 know." And I don't mean any -- but you cannot do
23 that.

24 So yes, Your Honor, we did move for a
25 mistrial yesterday. We did move -- we did believe

1 it was either reckless or intentional. We did move
2 for this case to be dismissed with prejudice.
3 So -- and the Court ruled on that.

4 THE COURT: Well, I asked you, are you moving
5 for mistrial because it took you a while to get to
6 that frame in the motion that you decided to do
7 that? So it didn't come up initially as a mistrial
8 motion. You indicated you did not want to come
9 up -- during the closing, you were going to have
10 the normal courtesies that are extended in the
11 usual trial setting, and you proceeded in that
12 fashion.

13 And that's why it's so important to have
14 the context. When I think back with Ms. Polk's
15 references to "we know," there could be a vouching,
16 like where we know. I mean -- you know -- I looked
17 at it as a comment in almost as saying, well, the
18 evidence as shown here in court. That's the way I
19 took it.

20 MR. LI: No, Your Honor.

21 THE COURT: If I missed that -- I mean, that
22 was the impression I had because I know what
23 vouching is. And to suggest that we have inside
24 information, we wish we could tell you about it,
25 and we really checked this out and we know, that's

1 vouching. I did not take those comments in that
2 vein.

3 MR. LI: Well, there is two kinds of vouching,
4 Your Honor, for the record. One is the latter that
5 the Court has just mentioned, that we have special
6 information.

7 But, Your Honor, it's not that. It's
8 just simply putting the weight of the government
9 behind any statement, any witness. And my
10 recollection is that this was in the context of
11 Ms. Brown's tape, which was another violation of
12 this Court's rulings.

13 We know what Ms. Brown was thinking.
14 Yes, we knew what the defendant knew and what
15 Ms. Brown was thinking. And this is all in the
16 context of explaining of the tape relating to Kirby
17 Brown, which was played for an improper purpose
18 which the Court had to instruct this jury.

19 There is nothing I've said, Your Honor,
20 that's inaccurate. It is a fact that the
21 defense -- that the defense was put in a position
22 of having to object to this Court, ask for a
23 limiting instruction -- not a limiting instruction,
24 an instruction on substantive areas of law to
25 correct the error that would, in fact, cause a

1 mistrial.

2 And, Your Honor -- you know -- I don't
3 want to interrupt the prosecutor in the middle of
4 her arguments. And I appreciated the courtesy that
5 she extended me just now to wait for this break.
6 But the reality is that those are violations.

7 MS. POLK: Your Honor, the reality is that
8 there has been flagrant misconduct, and there needs
9 to be an instruction to let this jury know that
10 what Mr. Li has suggested is simply not true.

11 THE COURT: I found it appropriate to provide
12 instructions previously to make sure there might
13 not be a misunderstanding that there could be an
14 inference drawn because of the nature of what was
15 presented, and I've indicated those instances.
16 Some of them were quite close, to me, in crossing
17 the line.

18 And you brought up first, Mr. Li, the
19 mention of "we know." And, again, that's the way I
20 took it. I'd have to see the -- the way I
21 described it is the way I took it. It was not
22 some -- putting some kind of authority behind it
23 other than a presentation of the evidence. And
24 that's just the way it appeared to me.

25 But to actually say that the Court had to

1 do something, this Court had to correct that, it
2 seems to me that if it gets to that point, you're
3 really -- you're saying more at the mistrial stage,
4 and I haven't seen authority for that.

5 I'll look at a proposed limiting
6 instruction, but we're going to take the noon
7 recess.

8 Thank you.

9 (Recess.)

10 THE COURT: The record will show the presence
11 of Mr. Ray and the attorneys.

12 And as I indicated, I have determined it
13 is appropriate to provide a special instruction,
14 and I have one that combines elements of both. And
15 I'd like to know what the parties think.

16 MS. POLK: Your Honor, the state agrees that
17 this instruction is appropriate.

18 MR. LI: We've made our record, Your Honor.
19 It's on the record.

20 THE COURT: Well, if you've made your record,
21 if you think there is something that your
22 instruction --

23 MR. LI: Mr. Kelly, go ahead.

24 THE COURT: -- is --

25 MR. KELLY: Judge, may I address for purposes

1 of the record?

2 THE COURT: Yes.

3 MR. KELLY: Judge, again, we object. We don't
4 believe that there is any reason to provide an
5 instruction to the jury at this point. So what
6 Mr. Li said was simply the truth. You want to
7 instruct the jury that it's improper for someone to
8 tell the truth.

9 Our proposed -- understanding your ruling
10 before lunch, we had proposed what we believed to
11 be a more correct statement of the law, and it does
12 not include the word -- or the inference that
13 someone has acted improperly. And, Judge, I would
14 submit that a jury and a juror could infer from
15 that last line of the instructions that I've been
16 provided, which reads, instructions are not my
17 comments as to whether or not any attorney or
18 either party may have acted improperly.

19 I would submit, Judge, that a juror could
20 improperly imply that that is a reference to Mr. Li
21 or, alternatively, to Ms. Polk. And that's what
22 we're trying to prevent.

23 So we had submitted a -- what I believe
24 to be a correct statement of the law, that simply
25 the instructions are not a comment on -- your

1 comment on the evidence.

2 And we believe if you're going to
3 instruct the jury, this would be more appropriate.
4 And with that, Judge, we leave it to your
5 discretion.

6 THE COURT: I know it's not a minor matter. I
7 can understand how a party might in the heat of
8 battle believe that something should be done. And
9 it happens. But to put the authority of the Court
10 behind, essentially, a discipline, so this is what
11 the Court had to do. Certainly nothing I've
12 confronted. And I think it's -- the jury can
13 consider arguments and consider -- consider those
14 things.

15 But what can't be considered is some
16 implication now of what happened in some proceeding
17 they went to and what I had to do and what my
18 reasoning was. That just needs to be neutralized.
19 As I tried to do in other instances, I'm trying to
20 find a fair way to do that that gets the record
21 back, gets the jury back on focusing on the law and
22 appropriate argument. I understand what can be
23 done in argument.

24 But that's a true statement. Those
25 instructions are not my comment as to whether or

1 not any attorney, either party, may have acted
2 improperly. That's just a true statement.

3 MR. KELLY: Your Honor, and given your
4 explanation, again, our request is simply that that
5 final sentence be stricken for the very reason that
6 you've explained, that what they are to consider is
7 the facts and the law as instructed by the Court.
8 And this Court or an attorney should not make
9 reference as to whether or not any party or any
10 attorney or either party may have acted improperly.

11 THE COURT: But you're saying you don't want
12 that last sentence.

13 MR. KELLY: Correct. Because of the very
14 reason that you just articulated, that may allow a
15 juror to improperly infer that Ms. Polk or Mr. Li
16 have acted improperly.

17 THE COURT: Well then, improperly or properly,
18 I don't care how we do it. What I want is I don't
19 want me to be part of telling that jury what I
20 think about one side or the other. That's not
21 appropriate.

22 It's really why -- the reason I did not
23 make a Brady instruction. That's -- an instruction
24 to the jury is not the place to address a Brady
25 problem. It may be in a mistrial. It may be in a

1 mistrial that results in a dismissal with
2 prejudice.

3 But the way to address it is not to
4 somehow let the jury imagine that I'm up here with
5 a lot more knowledge than they have and I've made
6 some decision that should color their
7 deliberations. That's not appropriate. And I want
8 a neutral statement out there.

9 There have been some accusations made
10 here and -- throughout the case. And at this point
11 I just want a neutral way to present that.

12 Mr. Kelly, if that's an issue, I want a
13 suggestion as to how to neutralize that. Because I
14 need to be taken out as a factor of me endorsing
15 one side or the other or being opposed to one side
16 or the other. That was not a proper comment by
17 Mr. Li.

18 MR. KELLY: Judge, I would simply request that
19 the last sentence be stricken. Then it is a
20 neutral comment.

21 MS. POLK: And, Your Honor, striking the last
22 sentence does not accomplish what the Court --

23 THE COURT: No, it doesn't. It does not.

24 MS. POLK: This is an appropriate instruction,
25 and the state would request that the Court give it.

1 THE COURT: And, Ms. Polk, once again, you can
2 see Mr. Kelly's point. Because now -- I mean, I
3 have some -- whether or not a party may have acted
4 improperly --

5 MS. POLK: And, Your Honor, if you want to add
6 may have acted improperly or properly or in the
7 reverse, I think that would address that concern.

8 THE COURT: I think it's rather awkward, but
9 it sure would. If there is no other suggestion,
10 then --

11 MR. LI: How about -- how about, Your Honor,
12 that these instructions are not, however, my
13 comment on the evidence or any attorney or party.

14 MS. POLK: Your Honor, that is inadequate.
15 That does not take care of the problem.

16 MR. LI: I just want to note for the record,
17 Your Honor, that there are scads of cases out
18 there. There are standard jury instructions in
19 many jurisdictions for Brady violations and other
20 violations. And I'll just --

21 THE COURT: I had a brief. And there was one
22 case, and I looked at the case. And there was --
23 it suggested that there could be an instruction.

24 I don't recall any attached instructions
25 to that brief, Mr. Li.

1 MR. LI: Oh. We attached an instruction,
2 Your Honor. We did.

3 THE COURT: Well, you said there were many
4 given. And I know that those aren't always in the
5 reported decisions or opinions, so you don't have
6 them. But you've got -- you know -- access to a
7 number of those. But I don't recall that being
8 attached.

9 MR. LI: Okay. Then I misunderstood --

10 THE COURT: Yes.

11 MR. LI: -- the Court's comment. I thought --
12 I thought -- we did proposed an instruction.

13 THE COURT: Well, absolutely. And you cited a
14 case. And I remember reading that case and making
15 the decision at that time that I was not going to
16 give that kind of instruction that, essentially,
17 would be me saying in this context that the state
18 acted improperly, and you can read things into
19 that.

20 MR. LI: There is a standard California
21 criminal instruction relating to that.

22 THE COURT: I don't think that was attached.

23 MR. LI: And I understand, Your Honor. But
24 I'm just for the record noting. And we're getting
25 it.

1 THE COURT: I'm inclined to have the last
2 sentence read, also the instructions are not my
3 comment on the actions of any attorney or party.

4 Ms. Polk.

5 MS. POLK: Yes, Your Honor. That would be
6 fine. Thank you.

7 THE COURT: I think that takes the acting
8 improperly out of it. It just says actions.

9 Mr. Kelly, anything else? Any other
10 record?

11 MR. KELLY: Judge, I believe we've put on the
12 record our objection to this instruction.

13 THE COURT: Okay. Thank you.

14 MS. POLK: Your Honor, just briefly -- I'm
15 sorry. But just another quick objection.

16 Mr. Li told this jury that Mr. Ray was on
17 trial for his life. I'm not requesting any relief
18 at this point other than to point out that the jury
19 is told that the party -- that they won't know what
20 the punishment is. And to me, that raises the
21 spectre of a problem.

22 I'm just raising it now to put the Court
23 on notice. And if Mr. Li continues to go down that
24 line suggesting to this jury that if they render a
25 guilty verdict that they are sending Mr. Li -- or

1 Mr. Ray to prison, that that would be highly
2 improper.

3 THE COURT: There is an instruction that
4 covers that.

5 Thank you.

6 (Recess.)

7 THE COURT: The record will show the presence
8 of the defendant, Mr. Ray; the attorneys, and the
9 jury.

10 Ladies and gentlemen, I have an
11 instruction for you. The instructions I have
12 provided to you orally and in writing are the law
13 that you must follow in this case. The
14 instructions are not, however, my comments on the
15 evidence. It is up to you, it is up to you, to
16 decide the factual issues in this case. Also the
17 instructions are not my comments on the actions of
18 any attorney or party.

19 Thank you.

20 Mr. Li, you may continue.

21 MR. LI: Thank you, Your Honor.

22 That's exactly right, ladies and
23 gentlemen. It is up to you. And before we broke,
24 I told you that you would be guided by two
25 principles, two simple principles, the truth and

1 the law.

2 I'd like to spend a couple of minutes on
3 the law because that -- that is a very important
4 part of your oath. The first thing is what you
5 heard from Ms. Polk was a civil lawsuit. That's
6 what you heard from Ms. Polk, a civil lawsuit.
7 This is not a civil case.

8 A civil lawsuit is where we try to figure
9 out whether somebody was negligent and whether
10 somebody should be compensated for that negligence
11 and whether some damages that occurred. You all
12 know what that is. Car accidents, wrongful death,
13 airplane crashes, Microsoft suing Apple for
14 \$10 billion. Those are civil lawsuits and have
15 specific rules. And I'll go through that briefly.
16 This is a criminal case, a completely
17 different matter. And in a criminal case, there is
18 a presumption of innocence. Here's what it says:
19 The law does not require a defendant to prove
20 innocence. Every defendant is presumed by law to
21 be innocent. You must start with the presumption
22 that the defendant is innocent.

23 Now, I want to make this clear. Our
24 founders were not kidding around about this. This
25 is the highest standard of proof there is in our

1 legal system. You must presume that Mr. Ray is
2 innocent. You cannot make assumptions. You cannot
3 make guesses. You cannot rely on innuendo.

4 I want to point out one small, but there
5 will be many places of innuendo that you cannot
6 rely on. You heard in the government's argument
7 that Mr. Ray when confronted by Sergeant Barbaro
8 like a -- like a -- I think she said like a child
9 with his hand caught in the cookie jar, said that
10 it was Ted who was in charge. That's innuendo.

11 Let me tell you what actually happened.

12 Question: And Lieutenant Parkinson, who
13 was standing right next to you, reports that
14 Mr. Ray explained that he had hosted the lodge once
15 a year, the lodge once a year, and this is the
16 fourth year of the event?

17 Yes. Answer: Yes.

18 That's what Lieutenant Parkinson put in
19 his report.

20 Question: So is it possible that you
21 understood something different than what he was
22 saying? That happens, doesn't it?

23 Answer: Yes.

24 That's innuendo, meaning taking a set of
25 facts, spinning them, making them sound as bad as

1 possible. That's innuendo. You cannot rely on
2 that. You can only rely on the evidence. You
3 cannot base your verdict on emotions.

4 Now, we talked about that before the
5 break. You cannot base your verdict on hearsay or
6 what somebody thinks they heard somebody else say
7 and is just speculating about what the conversation
8 meant and who understood what. You cannot base
9 your verdict on that kind of evidence.

10 You cannot base your verdict on whether
11 you like or dislike Mr. Ray. You can't base your
12 verdict on whether you like or dislike me or
13 Mr. Kelly or Ms. Do or any of the folks in the
14 state. You can't base your verdict on that,
15 whether you like or dislike me.

16 It's about the facts and the law, the
17 truth and the law. That's what I'm asking you all
18 to do. You cannot base your verdict on whether you
19 find Mr. Ray's ideas ridiculous, controversial,
20 whether you like them, whether you don't like them.

21 And you heard an instruction from the
22 Court that the First Amendment protects people and
23 what they think and believe. And you know that.
24 That is the First Amendment, the very first one.
25 And you know that. To do so, ladies and gentlemen,

1 would be to violate your solemn oath. And you will
2 not do that.

3 Now, what does "beyond a reasonable doubt
4 mean." The state has the burden of proving
5 Mr. Ray's guilty beyond a reasonable doubt. This
6 means that the state must prove each and every
7 element of each charge beyond a reasonable doubt.
8 Got that? Each element of each charge.

9 In civil cases, which this is not, it is
10 only necessary to prove that a fact is more likely
11 true than not true or that it is highly probable.
12 There are two different kinds of civil standards.
13 And I'll talk to you about that.

14 Now, you may understand and you know that
15 there are civil lawsuits in this case. This is
16 Exhibit 784. This is Laurie Gennari's lawsuit, and
17 you remember her. I will go through some of this
18 lawsuit with you.

19 She has sued. Others have sued. That's
20 a civil lawsuit. And other juries in other
21 courtrooms may someday sit in judgement on the
22 civil lawsuits. Was there negligence? Should
23 there be compensation paid? Did somebody mess up?
24 That's your typical civil lawsuit. That's not what
25 we're doing today. That's not your role. Your job

1 is to determine whether this accident was a crime.
2 That's your job.

3 Let me break it down for you a little
4 more. Okay? So we've talked a little bit about
5 burdens of proof. I want to break it down for you
6 a little bit more. Now, the Judge has instructed
7 you on what the law is. And so this is just my --
8 and the Judge will be the one who tells you what
9 the law is, not me. This is just my efforts to
10 help you understand how this all works.

11 So let's start at this, zero, right here.
12 This is -- you know -- nothing. This is what are
13 people doing out in the hallway right now? We
14 don't know. We have no idea. You cannot find
15 anything based on this, zero.

16 The next burden is what's known as
17 reasonable suspicion. About here, that's if you're
18 driving -- that's what it takes for a police
19 officer to pull you over and start an
20 investigation. If you cross a double line at
21 2:00 a.m. in the morning, they can pull you over
22 and maybe start an investigation. That's about
23 here.

24 Probable cause. That's about here.
25 That's when the government can search your house.

1 That's when the government can indict you, arrest
2 you, and that's if they have probable cause to
3 believe that a crime has been committed and you
4 committed it. That's right here.

5 Preponderance is 51 percent. That's
6 about here. 51 percent. It's a civil lawsuit.
7 That's if a fact is more likely than not.
8 Microsoft sues Apple for \$10 billion over the
9 software or something like that. If you find 51
10 percent, really 50.1 percent, for Microsoft or
11 Apple, you can award them \$10 billion. We decide
12 some of the most important issues in our entire
13 nation on these kind of -- 50.1 percent.

14 Then there is clear and convincing. And
15 that's the standard where it says highly probable,
16 highly probable, that a particular fact is highly
17 probable. That's about here. Okay?

18 Here's what you get -- here's what the
19 government -- here's what you decide on that
20 standard, clear and convincing, highly probable.
21 The state can take your kid away. They don't think
22 you're a good parent and they come up and they've
23 met that burden of proof, they can take your kid
24 away. They can take you off life support systems
25 at clear and convincing. They can have you

1 institutionalized, clear and convincing.

2 We haven't even reached probable cause.
3 Probable cause is the highest standard of proof
4 there is in this country. It's not -- you know --
5 it's not that they have to remove any doubt. Is it
6 possible that martians were involved or something
7 like that? That's not -- I'm not urging you to
8 believe in martians or baloney, as the state would
9 have you believe. I'm talking probable cause, what
10 our law is.

11 And that is if there is a -- this is
12 further instruction. In criminal cases, such as
13 this, the state's proof must be more powerful than
14 that. It must be beyond a reasonable doubt. So
15 that's why we're all the way down at that end of
16 the bar. It leaves you firmly convinced that the
17 defendant is guilty. Firmly convinced. Convinced.
18 You know.

19 And this is what I was getting to. If
20 there is a real possibility, a possibility, a real
21 possibility -- I'm not talking about martians. I'm
22 talking a real possibility -- that Mr. Ray is not
23 guilty, that means that the state has failed to
24 carry its burden. If there is a real possibility,
25 you must give Mr. Ray the benefit of the doubt and

1 find him not guilty.

2 That's what I'm talking about, a real
3 possibility. If there is a real possibility that
4 the state has not gotten you all the way here above
5 what it takes to take your kid away, if there is a
6 real possibility that they failed, you must, you
7 must -- your oath requires you to find him not
8 guilty.

9 Now, the state might say, well -- you
10 know -- look. This happens every single day in
11 courtrooms all over the country. So does landing
12 an F-18 on an aircraft carrier in a pitching ocean
13 at night. Okay? That's really hard to do.

14 And we have really highly trained people
15 who practice all day long for many thousands of
16 hours before they land that \$100 million plane on a
17 \$2 billion aircraft carrier, because if you mess
18 up -- you're low, you're high, you're left, you're
19 right -- you're going to kill some people. You're
20 going to ruin lives. You're going to cost a lot of
21 money. You're going to destroy things.

22 And before we let our government do
23 things like that, we expect that they are trained
24 and they are on it. They are going to land that
25 thing right off and hit the fourth wire and stop.

1 That takes a lot of precision. And that's what you
2 should expect from the government, precision, not
3 what we saw in this case.

4 Now, I want to talk to you for a second
5 about the concept of choice and what the state
6 would have you believe. You heard in opening
7 statement and you heard in closing statement from
8 the government that folks were fully conditioned to
9 follow Mr. Ray's instructions, that the Samurai
10 Game, quote, reinforced their need to obey Mr. Ray,
11 that the Vision Quest conditioned them to stay
12 inside yet another small, enclosed space, the sweat
13 lodge, and it affected their mind-set.

14 I want to talk to you about that for a
15 minute because in this country, we're free, all of
16 us, to choose what goals we want to set and what we
17 want to do with ourselves. We're free. We're free
18 to choose how much risk we want to take. That's
19 true in life. That's true in all the activities we
20 do. And that's true in business, for example.

21 I'll give you one example. I'll give you
22 two. My dad fled Communist China and immigrated to
23 the United States. He took every -- he started a
24 business, took every dollar he had, we had, and
25 invested it, including our house, and we lost it.

1 You know, we lost everything, lost the family home.
 2 But you will never, ever, ever, ever hear
 3 my dad complain about that. And you're not going
 4 to hear me complain because we're free. In this
 5 country, we're free. We can take our risks. It's
 6 our responsibility. You know. We're lucky. So
 7 you'll never hear us complain.

8 I'll give you another example. When I
 9 started this trial back in February, you guys
 10 remember back in February, I talked to you about
 11 climbing mountains, climbing Mount McKinley in
 12 Alaska. And I had a picture of it, but Truc told
 13 me it was cheesy to show you pictures of me
 14 climbing Mount McKinley.

15 But here's how it was. We had a guide, a
 16 climbing guide, and I had some buddies. And here's
 17 what the guide said to me and to all of us. It's
 18 going to be cold. You got that? Really cold. And
 19 it was. Okay? I got a little frost bite on my
 20 face, and my toes were frozen. You're going to
 21 feel like you're going to want to puke every day
 22 because it's really high. Okay? It's really
 23 scary, parts of it, because there are knife edges
 24 that you got to walk on. And you better feel okay
 25 about that because if you're not okay about that,

1 you're a danger to your team. You're a danger to
 2 everybody.

3 But it's just the thought. What do you
 4 want to do? Do you want to do this, or you don't
 5 want to do this? You're going to have to tough it
 6 out. You got that? You're going to have to tough
 7 this out. Okay? I got it. I'm in.

8 And as we're climbing, I'm not feeling so
 9 well. You know, I told you, I lost it a little bit
 10 every now and again. Okay. And what did my
 11 teammates say? They said, Louie, come on. They
 12 called me Louie. You can do it. Let's go. Come
 13 on, man. Let's go. You can do it. The guide
 14 says, you can do this, man. I know you can. You
 15 can do it. You can do it.

16 We walked and walked and walked. And at
 17 the end, I told you about this -- you know --
 18 you're walking on the knife's edge, 8,000 feet,
 19 exposure down there. It's just unbelievable.
 20 5,000 feet of ice that way. Tundra stretched out
 21 in front of you sparkling.

22 And I got to tell you. Other than -- you
 23 know -- the day I got married, the day my kid was
 24 born, best day of my life. Absolutely the best day
 25 of my life. Because I did something. You know, I

1 really achieved something.

2 And that's the -- that's the first
 3 problem with this case. You know, in this country,
 4 we're free to choose what we want to try to
 5 accomplish, how hard we're willing to push
 6 ourselves, what risks we're willing to take.
 7 That's how it works. And that's the first thing
 8 wrong with this case.

9 Because here's what the state says: The
 10 state says that these folks were conditioned to
 11 obey, conditioned because somebody said, you can do
 12 it. I believe in you. You can totally do this.
 13 You're all over this. I know you're feeling sick.
 14 You can do this.

15 That's not conditioning. Peer pressure
 16 is not conditioning. I could have said, hey, man.
 17 I'm not up for this. I'm done. Our country allows
 18 us to make those decisions. And we're responsible
 19 for them.

20 So let's get a few things straight.
 21 There is no evidence at all that anybody was forced
 22 to do anything. There is no evidence of blocking
 23 doors, shoving people in, locking doors. Everybody
 24 made knowing and informed choices ahead of time.
 25 Every single person decided what they wanted to do

1 for themselves. Every single person. That's the
 2 truth.

3 And you heard an amazing argument from
 4 the state that the fact that they signed waivers --
 5 and I'm not going to go through them. We did that
 6 as a -- you know -- quite a bit during this trial.
 7 Okay? But you heard an amazing argument from the
 8 state, which was the fact that a waiver said,
 9 hey -- you know -- these activities, which, by the
 10 way, include breathing and the Samurai Game and all
 11 that stuff. These activities might cause
 12 psychological injury, death, whatever, all those
 13 things. But that proves, proves, that Mr. Ray knew
 14 beyond a reasonable doubt that this activity
 15 carried a substantial and unjustifiable,
 16 unjustifiable, substantial and unjustifiable risk
 17 of death. Okay? That's the state's argument.

18 Okay. So let's break that down. If you
 19 go to an amusement park and you look at the back of
 20 your ticket, it says, hey -- you know -- things can
 21 happen. If you to the golf course, you sign up to
 22 play golf, you got -- you know -- you sign your kid
 23 up to play golf, you've got to sign a release.

24 You do just about anything. I went on
 25 the Internet. You know, these are not in evidence.

1 But I pulled stuff off, all kinds of releases.

2 This is from Frontier Day -- you know -- the rodeo.

3 This is for a race.

4 I mean, every single thing that you do --
5 as one of the witnesses said, everything that's fun
6 in this world, everything that's fun to do, you got
7 to sign a waiver. That doesn't prove that you know
8 that the person who's putting on this event -- a
9 golf tournament or something like that -- that
10 doesn't prove that they know that -- beyond a
11 reasonable doubt that there is a substantial and
12 unjustifiable risk of death.

13 These waivers show that all the various
14 participants knew or could have known if they
15 wanted to read them. Some of them -- some folks
16 said, hey, I didn't read it. Well, I don't know
17 what to do. I mean -- you know -- you sign it. It
18 says you had a chance to read it. You can choose
19 to read it or not. But it's your choice.

20 But all of these things say, hey, look.
21 There's a sweat lodge ceremony. There is a Vision
22 Quest. There is Holotropic breathwork. There is
23 yoga. There's hiking. There's swimming. You know
24 what, if you go swimming, you can drown. That does
25 happen. And -- you know -- that doesn't prove for

1 the fact that you're inviting people to go swimming
2 shows that you have knowledge beyond a reasonable
3 doubt that there is a substantial and unjustifiable
4 risk of death. That doesn't show that.

5 This is the Angel Valley waiver. And the
6 Angel Valley waiver encompasses both JRI and
7 Angel Valley. It says -- you know -- that it
8 includes people who are off-site who are coming in
9 to have events. And it says -- you know -- the
10 same thing. Even though Mr. Hamilton -- I forgot
11 the exact term he used to describe it. I think he
12 said something like it was an opportunity to accept
13 responsibility or something like that.

14 It's actually just a liability and waiver
15 form. That's what it is. It's a legal form. It's
16 not a philosophical form. You can stick a little
17 philosophical thing on top of it. But, basically,
18 it's a legal form. And the people who signed it
19 agree to waive, release, each the Angel Valley
20 parties, which includes Mr. Ray and JRI, of any
21 claims for all acts of negligence arising as a
22 result of any activity.

23 It also -- you can't read it too well,
24 but you will have these back in evidence. It also
25 talks about how you're responsible for your own

1 health. If you want to go talk to a doctor, figure
2 out whether you're healthy enough to do this,
3 that's your choice. You do it. That's very
4 common. So before -- and this is months before the
5 sweat lodge. Okay? Months.

6 So before the ceremony, people were told
7 about the activities. They knew about the
8 activities -- they could know about the activities.
9 They agreed to waive claims even if negligence was
10 involved. And I understand this is civil. And
11 they agreed that they were responsible for their
12 own medical conditions. That's how we normally do
13 things here.

14 Normally if you go river rafting in the
15 Grand Canyon, you go horseback riding, ATV riding,
16 fly fishing, golf lessons -- I mentioned golf
17 lessons. This is not in evidence. This is just to
18 demonstrate what we're talking about.

19 This is the City of Phoenix. And when
20 you sign your kid up to play golf, you got to sign
21 this waiver. And there are all kinds of things in
22 there, including negligence from the City of
23 Phoenix or for the provision of medical or
24 emergency assistance, inattention, supervision of
25 participant and their surrounding environment.

1 That's how our system normally deals with
2 people trying to figure out what they want to do,
3 what they don't want to do, how much risk they're
4 willing to take and how much risk they're not
5 willing to take.

6 Now, the government again and again with
7 several witnesses said, hey, well, the State of
8 Arizona is not on this waiver, is it? You don't
9 see the State of Arizona here. I never said that
10 they were. It's not -- I never said they were.

11 Here's the truth. Some states restrict
12 your freedoms. Some states don't let you ride your
13 motorcycle without a helmet. Some states make it
14 just about impossible to smoke. Some states don't
15 let you carry a gun.

16 There are some states that tell you that
17 we're not going to allow trans fat, which are the
18 fats in burgers and Oreos and, basically, things
19 that taste good. And they're saying for your own
20 health we're going to tell you you can't have
21 these. Okay? Some states do that. Because they
22 say, hey. We know better than you -- you know --
23 what's safe and what -- we're going to allocate for
24 you your risk. We're going to decide.

25 Arizona is not that kind of state. I

1 think you know that. So here you're allowed to
2 make your choices. You don't need the government
3 to tell you what choices you want to make. And
4 when you do that, you assume full responsibility
5 for your choices.

6 And, in fact, people did choose. You
7 heard it throughout this case. People left. They
8 said that people left the event. People decided
9 not to go in the sweat lodge. People went in the
10 sweat lodge and came out. People went back in.
11 James Shore himself helped somebody out, and he
12 chose to go back in.

13 Now, Ms. Polk's argument is that he was
14 conditioned to do that. He was conditioned to help
15 somebody go all the way out. Now, that's 23 feet.
16 Okay? So here we are. We're right here. And I
17 can't do the whole circle. But I'm helping
18 somebody all the way out of the circle. And I'm
19 cramped down -- you know -- and I'm helping
20 somebody.

21 And remember the sweat lodge is, like,
22 what. Four feet tall. And I'm helping somebody
23 all the way out. I take them all the way to the
24 door, help them out, and then I go all the way back
25 in. And I'm just walking. But imagine if I

1 were -- you know -- on my hands and knees crawling
2 and all that, and I was actually doing a circle.
3 And that's what happened.

4 Now, the State wants you to think, oh.
5 Well, that shows he was conditioned, that he was
6 brainwashed. And that's just not the case.
7 Because you heard the tape, Exhibit 747. And if
8 you want it, here it is. You can play it. This is
9 the whole what we call the "pregame speech" or the
10 speech about what to do in the sweat lodge
11 ceremony. And you heard it. If you have to leave,
12 then you need to. And you're right here, and you
13 can't duck out this way. You have to go all the
14 way around and go out of the lodge.

15 I'm not going to read the whole thing.
16 You've already heard it many, many times. But,
17 basically, if you have to leave, you leave, and you
18 leave in a very, very controlled manner.

19 How does that condition somebody not to
20 leave.

21 You know, my coach -- when I was a kid --
22 you know -- in high school, my coach didn't say, do
23 it. You can do it. Let's go. Let's go. Let's
24 go. Let's go unless you don't want to. There was
25 never the carve out. It was always, do it. Do it.

1 Do it. Go. There is never the unless you don't
2 want to. Okay?

3 This is, you can do it. I know you can
4 do it. But if you got to leave, here's how you do
5 it. That's not conditioning. And the evidence was
6 that about half of the people chose to leave.
7 That's not conditioning.

8 Now, let's talk about conditioning. And
9 I want to make clear I'm not saying -- I am not
10 saying that anybody chose what happened to them.
11 Okay? I'm not saying that. What I'm saying is
12 this idea that people were conditioned into things,
13 brainwashed into things, is not correct.

14 And this is what I called in the
15 beginning of the case -- and I told you. I'm going
16 to tell you exactly the same things that I told you
17 on March 1st. This is what I called the "adults
18 can't choose for themselves theory." That's what I
19 called it then. That's what I call it now.

20 This is the theory that's supposed to
21 allow you to ignore all the red flags about toxins,
22 the lack of elevated temperature and dehydration --
23 we'll get to that. Okay. The lack of the medical
24 evidence supporting heat stroke, the fact that
25 evidence was destroyed and/or lost and failed to be

1 preserved. The fact of all the -- we're supposed
2 to ignore all of that because adults can't choose
3 for themselves.

4 And you may have heard throughout this
5 case, barely concealed, some idea that Mr. Ray runs
6 a cult. And he doesn't. Let me just deal with
7 that. He runs a business. That's where it was.
8 That's what it looks like inside. There is
9 Rebecca's little welcome back thing. That's not a
10 cult. Okay?

11 Do you remember Laura Tucker? Was she --
12 she was not a cult member. She was just a nice
13 lady.

14 Jeanne Armstrong. She's a doctor. She's
15 competent. You heard her testify. And this is not
16 a cult member.

17 Scott Barratt. That was the cowboy and
18 former pilot. He's not a cult member.

19 Dr. Nell Wagoner. She's a doctor from
20 Alaska. She's not a cult member.

21 Dawn Gordon, one of the last people you
22 saw, financial analyst -- you know -- fairly
23 sophisticated lady. She's not a cult member.

24 These folks, they went to Mr. Ray for
25 advice, not religion, not religion.

1 And you remember two witnesses in this
2 case, two witnesses just couldn't restrain
3 themselves from getting out the I am the Alpha, I
4 am the Omega comments. Fawn Foster and Amayra
5 Hamilton, both of them from Angel Valley. They had
6 to get out the fact that Mr. Ray at some point
7 during the ceremony said the words, "I am the Alpha
8 and I am the Omega." That is a quote from the
9 bible. That's a quote from Revelations. People
10 happen to quote the bible when they say prayers.
11 That is actually something folks do.

12 You may not agree with Mr. Ray quoting
13 the bible in his context. That's okay. You know,
14 it's not -- it might not be your cup of tea, might
15 not be mine, might not be anybody's. But he's
16 allowed to do that.

17 So the point is there isn't a single
18 person in this case that actually thought that
19 Mr. Ray was God. There isn't a single person in
20 this case who actually thought that Mr. Ray was
21 telling everybody I am God. There is nobody.

22 So here's what this whole mind control
23 thing has boiled down to. And we heard months of
24 testimony. And I will not bore you with more of
25 it. Okay. But we heard about the haircuts. We

1 heard about the meditation. We heard about the
2 vegetarian diet. We heard about breathing, huffing
3 and puffing, until you got dizzy or fell asleep.
4 Some people just took naps.

5 We heard about the Samurai Game. Does
6 anybody need to hear more about the Samurai Game?
7 Anybody here want to hear more about that game? So
8 how many times can we hear the state say, and what
9 happened when Mr. Ray condemned you to die? And
10 after you died, what happened? You guys can figure
11 that out. Nobody really died. Nobody was really a
12 ninja or a samurai or an angel of death or God.
13 Nobody was that.

14 And then you heard about the Vision
15 Quest. This is the same Vision Quest that the
16 state says conditioned people to stay inside small
17 spaces. Okay? So Vision Quest is, basically,
18 camping out in the desert for 36 hours and fasting.
19 They had been fasting.

20 And you draw a circle -- and I did this
21 in opening statement. You could have stood in the
22 circle. You could have stepped out of the circle.
23 You could have walked 10 blocks this way. You
24 could have walked 10 blocks that way. Nobody is
25 going to stop you.

1 You can write in your journal. You can
2 go to sleep. You can look at the stars. You can
3 look at the birds. You can do whatever you want in
4 there. That's not conditioning. That's just, hey.
5 Look. Here's something for you to do if you want
6 to do it. You can sneak food out there. Somebody
7 did by accident.

8 But you did hear from some witnesses who
9 told you that they had been hypnotized. There was
10 mass hypnosis. That's Laurie Gennari, the same
11 person the state wants you to believe. Okay? This
12 is in the lawsuit. Do you remember that? Do you
13 remember me showing Ms. Gennari the lawsuit?

14 She told us that she had never, ever,
15 ever said that James Arthur Ray had blocked her
16 passage with threats of offensive touching. She
17 said, I never said that ever, never, ever, ever,
18 until I showed her the lawsuit. And then she had
19 to admit, oh, yeah. Okay. Yeah. Okay. That's
20 right. I did say that. And it's not true. And I
21 got to go talk to my lawyer about that.

22 And then she said, it's not really my
23 responsibility who -- what people file in lawsuits
24 on my behalf. It's not really me. This is the
25 same lawsuit that says if Mr. Ray is convicted of a

1 felony, she gets her attorney's fees. Do you
2 remember that? This is the same lawsuit. If you
3 want to look it up, that's at paragraph 32 of this
4 lawsuit, Exhibit 784.

5 And remember she was the one who was --
6 after the tragedy went to Sedona. And I think one
7 of you asked, how long did she go shopping? That's
8 Laurie Gennari.

9 You also heard from -- this is Melissa
10 Phillips and Ms. Rainey, who the state mentioned.
11 Here's a question: This is the second day of
12 trial, March 2nd, 2011. Did Mr. Ray lead you to
13 believe that it was okay to ignore those symptoms
14 of your body? Question.

15 Answer: He told us that we were all
16 self-responsible. We had to pay attention to our
17 own bodies.

18 Right there you can take this whole idea
19 that Mr. Ray said ignore your symptoms, you can --
20 right there. You can say, hey, there is a real
21 possibility that that's just wrong -- what the
22 state said is just wrong.

23 And you've got Melissa Phillips on the
24 second day of trial saying, hey. He told us that
25 we were all self-responsible. We had to pay

1 attention to our own bodies.

2 And then at the very end of the trial --
3 this is May 26th, 2011 -- Ms. Rainey -- Brandy
4 Rainey: Ms. Rainey, are you --

5 Question: Ms. Rainey, are you somebody
6 who is conscious of your body?

7 Answer: I would say yes.

8 Question: Are you somebody who listens
9 to what your body is telling you?

10 Answer: Yes.

11 So on both ends of the trial, the first
12 day -- I mean, sorry. The first day of evidence
13 and almost the last day, you got people who
14 participated who say, hey, you know what. I listen
15 to myself. That's what I do.

16 But that's not all. So right there you
17 can just say -- you know -- that whole theory is
18 wrong. There is a real possibility the state's
19 failed.

20 But that's not all. We literally have no
21 evidence at all of what Ms. Brown, Ms. Neuman, and
22 Mr. Shore were thinking. We have literally no
23 evidence at all what they were thinking.

24 What we have is the state's selectively
25 picking various people, like Dennis Mehravar.

1 Remember him? He was the guy who was on tape --
2 you know -- meditating to the sound of rocks -- I
3 mean -- sorry -- rain and bells. And I think the
4 tape said, I had to pull it off my head because it
5 was just driving me crazy. It was really painful
6 for me.

7 The state wants you to rely on those
8 witnesses -- Beverly Bunn, on TV, the whole
9 thing -- Beverly Bunn, but not rely on Dr. Jeanne
10 Armstrong, Dr. Nell Wagoner, Melissa Phillips. I
11 can go through the whole list of all the people
12 we're not supposed to rely on, but we are supposed
13 to rely on a select few. To then make the leap
14 from what Dr. Beverly Bunn, who, by the way, is a
15 dentist. We're supposed to make the leap from
16 Beverly Bunn's state of mind to what the folks who
17 passed away.

18 How do we do that? How do we take what
19 I'm thinking about why I'm doing what I want to do
20 and impose it on Detective Diskin? I don't know
21 what he wants to do. How do you know what he
22 wants -- I can say, I want to do "X," "Y," and "Z."
23 How do you know what Detective Diskin is thinking
24 based on what I'm saying? You don't.

25 So here's what we have. We have -- and

1 this is what the state wants you to believe beyond
2 a reasonable doubt. What we have is that Ms. Brown
3 was eliminated in the Samurai Game early. And then
4 she stayed on the floor and wasn't feeling well.
5 And you heard a tape where she talked about how she
6 felt and things like that.

7 We don't even know -- and you heard the
8 Court. We don't even know if that's actually what
9 happened, and you can't rely on that. But even if
10 you did, how do we go from that to being
11 conditioned to obey? How do we make that leap when
12 you have all these other witnesses who say, I don't
13 know? I listen to my own body?

14 Liz Neuman. The state wants you to
15 believe that Ms. Neuman because of the wine
16 drinking party the night before when Mr. Ray came
17 in and dressed them down and said -- you know --
18 you guys are not supposed to be drinking. You're
19 supposed to be holding space.

20 Ms. Polk wants you to believe, the state
21 wants you to believe, that he was upset because
22 he -- because she interrupted his nap, but -- okay.
23 Let's assume it's because he's a jerk. Let's
24 assume for a second Mr. Ray is a jerk, and we don't
25 like him because he's selfish and he wanted to take

1 a nap and he dressed people down.

2 And he said, you shouldn't be drinking
3 while I'm trying to take a nap. That's the kind of
4 guy he is. Let's assume that's the case. Well,
5 there's not evidence of that, but let's assume
6 that's the case. How does that get to
7 conditioning?

8 The state says, you can infer from that.
9 You can infer -- the state said this. You can
10 infer from that that Ms. Neuman was conditioned to
11 obey. You can't. You can't.

12 James Shore, Mr. Shore. We heard a
13 speech where he said, very admirable thing, I want
14 to live my life with integrity. I want to honor
15 people, all those things. Those are very honorable
16 thoughts. They're good things.

17 But how do we infer from that -- I can
18 say it right now. I want to be a good dad. I want
19 to be a good person. I want to be loyal and true.
20 And I want to live with integrity. And I want to
21 be like a samurai.

22 How do you infer from that that this
23 man's been conditioned to obey and that he's been
24 conditioned to walk -- or crawl those 23 feet out
25 and then those 23 feet back without saying, hey, we

1 need to stop this? How do you do that? You can't.
2 You just can't.

3 And that's the other thing. That's the
4 thing that's just wrong with this case. It's right
5 there, right there. That's what's wrong with this
6 case. How do you say beyond a reasonable doubt
7 that that's what actually happened? You can't.

8 Now, the second thing that I told you I'd
9 talk about -- and I appreciate your attention. And
10 I know we always get the -- for some reason, you
11 and I always seem to get the food-coma shift, and
12 so I really appreciate your attention. I really
13 do. We've been together for a real long time, and
14 I appreciate it. I want you to know that. And I
15 know how hard it is.

16 The second thing that the state has
17 failed to do is to prove that -- the medical
18 issues, prove the causation. Now, this is the law.
19 The state must prove beyond a reasonable doubt that
20 a superseding, intervening event did not cause the
21 deaths.

22 So, again, I -- I don't know how many
23 times to say this -- it's not up to me to prove to
24 you that something happened -- else happened. It's
25 up to the state to prove to you that it didn't

1 happen. That's what the law is.

2 And let's just be clear. A toxin -- an
3 unknown toxin would be a superseding, intervening
4 event. Okay? Remember way back when, there was
5 the Legionnaires disease in, I think, Philadelphia
6 or something like that. And there was a hotel.
7 Nobody -- people died. Nobody knew what was going
8 on. You couldn't figure it out. And ultimately
9 they figured out there was actually a toxin and a
10 bacteria in there that killed these folks. That's,
11 like, a superseding, intervening event.

12 If the State of Arizona, then, prosecuted
13 the hotel or the -- not even the hotel -- sorry.
14 Excuse me -- the person who rented out the hotel
15 for manslaughter and it turns out that there is
16 something else going on, that would be a
17 superseding, intervening event. And the state has
18 to prove that that didn't happen. Okay? Are we
19 clear? They have to prove it didn't happen. And
20 they failed.

21 Okay. So let's start with one thing.
22 From the very start of this case, you recall that I
23 wrote this up -- up here, and unfortunately I ran
24 out of space. And the sad thing is when you write
25 something, you got to live with it because we've

1 lived with this thing for four months now, and
2 every time I see it, it's kind of embarrassing
3 because I ran out of space.

4 There are two things you have to have to
5 have heat stroke. You have to have an elevated
6 temperature. The state spent a lot of time telling
7 you you don't have to have an elevated temperature.
8 You do. That's why it's called "heat stroke."
9 Okay?

10 So if the state can't prove that these
11 folks had an elevated temperature, whatever the
12 diagnostic criteria is of -- for a medical
13 examiner, which is a different issue, whatever the
14 medical -- you need an elevated temperature before
15 you have heat stroke. That is what the disease is.
16 Your body is not cooling itself down.

17 The second element is dehydration. And
18 we'll talk about that in a second because the
19 state -- I don't know what their story is on
20 dehydration. Is it important or is it not
21 important? Does the Vision Quest matter because
22 they weren't drinking out there? Does it not
23 matter or does it matter? I can't tell. Sometimes
24 it matters. Sometimes it doesn't.

25 So here's the undisputed facts: These

1 are the undisputed facts. Nobody, nobody at all,
2 not a single person, had a severely elevated
3 temperature. Nobody was near 104, 105, 106 mark
4 for heat stroke. And we'll talk about cooling in a
5 second. Okay? I'm not ignoring that. But it is
6 the state's burden to show people had heat stroke.
7 And they don't have it.

8 So here's what the state wants you to
9 believe: Well, actually people were cooled off.
10 Okay. The people were cooled off. It's possible.
11 You know, it's possible. It happens to not be
12 consistent with the evidence, but it is possible.
13 But that's not enough. You need proof that they
14 were cooled off.

15 So let's start with a few folks. There
16 is no evidence at all anywhere, not a single piece
17 of evidence anywhere, to indicate that Kirby Brown
18 or James Shore was cooled off. Witnesses saw CPR
19 because they needed to it. But not a single person
20 came in here and testified that Kirby Brown or
21 James Shore was cooled off.

22 Jennifer Haley, who was in charge of the
23 hose -- remember her? She did not -- she told you
24 the hose didn't reach there, and so she did not
25 cool them off. Neither did -- secondly, neither

1 did the EMT. The EMT did not cool her off.
 2 Dustin Chambliss. Remember him? He was
 3 an EMT.

4 Question: And you were not aware, I
 5 believe you said on direct examination, of any
 6 efforts to cool her down. Correct?

7 Answer: Correct.

8 That's the EMT. He treated Kirby Brown.

9 And then Greg VanderHaar, the other EMT.

10 And he said, and you are unaware of any --

11 Question: And you are unaware of any
 12 effort to cool him down; correct.

13 Answer: I am unaware of any effort.

14 So you have no evidence. The state wants
 15 to tell you, oh, you can make a reasonable
 16 inference. No, you can't. No, you can't. You
 17 need evidence. And you don't have it.

18 And here's what Dr. Wagoner said about
 19 Liz Neuman:

20 Question: What other physical attributes
 21 did you notice on Ms. Neuman?

22 Answer: Her skin was very, very cold,
 23 and I put a towel over her.

24 Question: Did you see any saliva coming
 25 from her mouth?

1 Answer: Yes.

2 Question: Describe that. About how
 3 much?

4 Answer: It was just bubbling. It was
 5 very clear.

6 And this is, like, a week into trial.

7 And then, were you able to assess what
 8 her breathing was like?

9 Answer: She was breathing regularly.

10 There was saliva and foam coming from her mouth.

11 So she was cold to the touch.

12 Dr. Wagoner got her right after -- got right to her
 13 right after she came out of the lodge. And she was
 14 cold, very, very cold. That's before the EMT's
 15 arrive.

16 And Jennifer Haley, who is in charge of
 17 cooling people off, said that she had used two
 18 cups, two cups, of water. Remember that? Two
 19 cups.

20 Ms. Do asked, what did you observe with
 21 respect to attempts to cool Liz Neuman down after
 22 she'd been pulled out of the tent.

23 Answer: I put two cups of water, ice
 24 water, and left her with two other Dream Team
 25 members.

1 What size cup did you use?

2 Not much bigger than these.

3 The cups at the witness stand?

4 Yes.

5 With two cups. Two cups of water gets
 6 her from 105, 104 degrees to very, very cold to the
 7 touch. Those are the facts. There are no other
 8 facts.

9 What the state wants you to do is
 10 speculate. Well, maybe something else happened.
 11 Because you actually need evidence to get you
 12 there. So if Mr. Shore's temperature was 104 at
 13 any time, ask yourself, what's the proof? What
 14 fact? What testimony? If he was cooled, what
 15 testimony establishes that? What fact? What
 16 person said that?

17 If Ms. Brown's temperature was over 104,
 18 what proof? What fact? What testimony? Because
 19 the EMT explicitly said they didn't do it.

20 And what about Ms. Neuman? Nell Wagoner
 21 said she was very, very cold. She gets her right
 22 after she comes out of the lodge. You go from 105
 23 to very, very cold with two cups of water that
 24 quick. What facts? What gets you there? State
 25 wants you to believe that. But they failed. They

1 say you can infer. You can guess. You can

2 speculate. But there is no evidence.

3 Now, the second thing I want to talk to
 4 you about is dehydration. And the state wants to
 5 now tell you dehydration doesn't matter. It's not
 6 important. It's not an important factor to heat
 7 stroke.

8 I mean, first of all, that's just not
 9 common sense. People -- when you get hot and you
 10 sweat, you get dehydrated. But you don't have to
 11 take my word for it. I mean, you don't even have
 12 to take Dr. Paul's word of it. Okay? You should,
 13 but you don't have to because here's Dr. Lyon, the
 14 medical examiner, doing the autopsy on these folks.
 15 Okay?

16 He says vitreous, that's the eye fluid,
 17 which is the gold standard for dehydration, to test
 18 for dehydration -- this is the medical examiner
 19 assigned to do the investigation for James Shore
 20 and Kirby Brown. He says, vitreous is very
 21 important to this case, exclamation point.

22 This is for Kirby Brown. This is a
 23 different form. Vitreous is very, very important
 24 to this case. Why? Because that's how heat stroke
 25 works. Why does the medical examiner want to look

1 at this if it doesn't matter? And just in case the
2 state wants to tell you that their experts didn't
3 say this and that -- you know -- just because they
4 wrote it on the form doesn't mean it's true.

5 Here's Dr. Mosley.

6 Question: But there are labs that you
7 can run -- correct? -- to determine whether or not
8 there is evidence of heat stroke or hyperthermia?

9 Answer: The labs that I would run would
10 be to see if there was dehydration, which usually
11 goes along with heat stroke.

12 And that's what we call --

13 Question: And that's what we call a
14 vitreous test; correct?

15 Answer: Right. Vitreous electrolytes.

16 And what happened when they tested? What
17 happened? They were not dehydrated. All the
18 doctors got up there and told you none of those
19 folks were dehydrated.

20 So then we spent weeks with testimony
21 from the state with Mr. Hughes asking various
22 medical examiners, well, can you rehydrate somebody
23 after they pass away? Assume for a second they got
24 an IV. There is one liter of normal saline being
25 pumped in there, and there is CPR being performed.

1 Can that rehydrate the eyeball? You heard from
2 Dr. Paul. No. And, again, I'll get to Dr. Paul.
3 You don't have to rely on him.

4 Dr. Lyon said -- you know -- he was a
5 very terse man. He said, no. They're dead. And
6 then Mr. Hughes asked again, well, what if they
7 were pumping and -- you know -- attempt to
8 resuscitate? Could you -- with -- you know -- one
9 liter of normal saline, could you rehydrate
10 somebody? And he looked at Mr. Hughes again and he
11 said, no. They're dead.

12 So what's the story? Are they dehydrated
13 or are they not? Does it matter or does it not
14 matter? Why do you got to get Dr. Dickson, some
15 guy who might be a great ER doctor? Okay? But why
16 do you got to get another doctor to go tell you
17 all -- why does the State of Arizona have to get
18 another doctor to tell you all that the medical
19 examiners who were employed by the State of Arizona
20 are wrong?

21 An ER doc talking about what medical
22 examiners do. Why do you got to -- then maybe we
23 should fire the medical examiners because they came
24 in here and told you that, one, they filled out a
25 form saying vitreous is important. Dehydration is

1 important.

2 The other guy came in and said, yeah. I
3 checked for dehydration. And then you got another
4 doctor who the State of Arizona has hired for this
5 case to come in and say, oh, you know those other
6 guys. They don't -- you don't need dehydration.

7 Does that make any sense at all?

8 Right there, ladies and gentlemen, there
9 is no clinical evidence at all of heat stroke,
10 none. None. No clinical evidence. What does that
11 mean? "Clinical evidence" means confirmable
12 medical facts, not speculation, not sort of
13 guesswork, confirmable medical facts. Right there
14 on that alone you got a reasonable possibility the
15 government has not gotten all the way here. Right
16 there.

17 Your Honor, would this be a good time.

18 THE COURT: We need to go ahead and take a
19 recess.

20 Ladies and gentlemen, please remember all
21 aspects of the admonition. You cannot communicate
22 among yourselves about the case in any way.

23 And please be assembled at a quarter,
24 about after, about 20 minutes.

25 (Recess.)

1 THE COURT: The record will show the presence
2 of Mr. Ray, the attorneys, and the jury.

3 And, Mr. Li, you may continue.

4 MR. LI: Thank you, Your Honor.

5 And I've put on this mic, so you guys let
6 me know if it's too loud or too soft or whatever.
7 All right? Because I know sometimes I can get a
8 little heated. So just let me know.

9 I also made a mistake several times
10 before we took the break. I said probable cause
11 when I was standing over here. And I think you
12 know that's not what I meant. I mean beyond a
13 reasonable doubt. That's the standard.

14 Please let me know. I've never used one
15 of these before.

16 I want to finish up this conversation
17 about dehydration. I need you to ask the state,
18 which is it? Does it matter, or does it not
19 matter? Is it important or is it not important?
20 Is Dr. Lyon -- when he sends out tests, he says,
21 vitreous fluid, very important. Is he -- is that
22 wrong? Is the state's medical examiner just wrong
23 about that, just doesn't know what he's talking
24 about? Or is he right when he does it twice and
25 when it's underlined twice?

1 When Dr. Mosley says, yeah, I'd send it
2 out for testing with dehydration because that's
3 what you find normally with heat stroke, is
4 Dr. Mosley right or is he wrong? What's the story?
5 Does it matter or does it not?

6 Does the Vision Quest matter or does it
7 not? Because I seem to remember a lot of questions
8 and a lot of -- from the state and a lot of
9 witnesses talking about how they were dehydrated
10 and how this was somehow important.

11 So we need to know. Does the Vision
12 Quest matter or does it not matter? Does the fact
13 that they didn't drink for, what, 36 hours and then
14 drank a bunch before the heat -- before the sweat
15 lodge, does that matter or not? Because it sure
16 seems like it's whatever the state wants it to be
17 at that particular moment. Because it doesn't
18 matter if there is no evidence of dehydration.
19 Then it doesn't matter at all. But it does seem to
20 matter when you're talking about Mr. Ray and having
21 people go on Vision Quest. So which is it?

22 Oh. One other thing. Liz Neuman, who
23 passed away. She didn't go on the Vision Quest.
24 So two people did. One person didn't. All of them
25 tested negative for dehydration. Does it matter or

1 does it not matter?

2 And why does the state keep on changing
3 its story? Why is that? Why do we need a doctor
4 to -- you know -- the term "impeach," to sort of
5 question the credibility of the state's medical
6 examiners? Why do we need that? Well, why did the
7 medical examiners think it was important? You need
8 to ask the state, can you answer that? What is it?
9 Is it important or not?

10 I'm going to tell you it's important. It
11 is because we don't know that. The medical
12 examiners -- when people whose job it is to tell
13 you why people died, that's their job. They're
14 paid by the State of Arizona. Their salaries are
15 paid by your tax dollars. When they get up on the
16 stand and they say, yeah, it matters.

17 When they sent out forms to test for it,
18 why test for it if it doesn't matter? Why waste
19 the taxpayers' money on something like that if --
20 who cares? It doesn't matter? It does matter
21 except when the state doesn't want it to matter,
22 except when it shows that they failed to meet their
23 burden. That's when it doesn't matter.

24 Same thing with elevated temperature.
25 Remember, it's the state's burden to show you that

1 folks actually had an elevated temperature, not to
2 provide you with a bunch of excuses as to why they
3 didn't. Okay?

4 How do they explain away Nell Wagoner, a
5 doctor, a doctor whose got her hands on Liz Neuman
6 right after the accident? She's a doctor. And she
7 tells you, very, very cold. So do you need to be
8 hot -- very, very hot to have heat stroke? Or can
9 you have heat -- would Dr. Dickson tell you, you
10 can have heat stroke if you're very, very cold?

11 What's the answer? Can the state prove
12 beyond a reasonable doubt that any of these folks
13 had an elevated temperature, -- a severely elevated
14 temperature? Can the state prove beyond a
15 reasonable doubt all the way up to here any of
16 that? They can't.

17 So that's when all the stories start
18 coming about, well, dehydration doesn't matter
19 because the tests didn't show it, so it doesn't
20 matter anymore.

21 Elevated temperature. You can just
22 assume that people were cooled off even though
23 there is no evidence, even though the EMT guys who
24 were treating Ms. Brown and Mr. Shore said they are
25 not aware -- these are the guys who are actually at

1 the patients. They're not aware of any
2 treatment -- any cooling. Okay? They are not
3 aware of it.

4 With Liz Neuman, who is cold to the touch
5 and who gets two glasses of water dumped on her,
6 they're going to say, oh, well, that proves. You
7 can just assume that she was at 105 and then
8 dropped down to 99. Actually, really her first
9 recorded temperature is 97. Okay? Her first
10 reported temperature at 6:25 is 97 degrees.

11 Now, Dr. Paul said, well, look. We'll
12 give you two degrees because -- you know --
13 sometimes these are inaccurate. So we'll push it
14 up to 99.5 degrees. Is that proof? Has the state
15 proven to you that she was cooled off with two cups
16 of water? Did you hear any other testimony in this
17 courtroom? We were here for months. Did you hear
18 any other testimony that said she was cooled off,
19 actively cooled? That's like an ice bath, actively
20 cooled.

21 What you saw instead was Mr. Hughes for
22 the state show you -- or show Dr. Paul an ear
23 temperature and wind speed chart from the Sedona
24 airport, which is 5.6 miles away on a mesa --
25 remember, Angel Valley is in a valley -- up on a

1 mesa and then suggest to the doctor that the wind
2 was 26 or 27 miles an hour. It wasn't. That is a
3 gust at the top of the mesa. Okay?

4 The actual wind speed -- and you'll have
5 it. I forget the exhibit number. But the actual
6 wind speed -- I think it's 148. The actual wind
7 speed was something like five or six miles an hour.

8 So do you have proof that these folks
9 were actively cooled and that their temperature
10 dropped that quick? Do we have that proof?
11 Because we don't. On that ground alone, on that
12 alone, the state's failed to make its burden beyond
13 a reasonable doubt. On that ground alone.

14 But you guys know. You all know there is
15 a whole lot more. There's a whole lot more. This
16 is the house of cards that Ms. Polk is talking
17 about. It's not a house of cards. This is just
18 where the evidence takes you if you actually look
19 at it.

20 If you actually pull out the records and
21 start reading them, which they didn't do, you
22 actually saw the first time a lot of these things
23 start. You actually saw the state working it out
24 in front of you a year and a half after the
25 indictment, almost a year -- I'm sorry -- a year

1 after the indictment and almost two years -- or a
2 year and a half after the accident. You saw in
3 front of you the state figuring it out and trying
4 to backfill and trying to explain it away.

5 Because the first thing the state
6 ignored, okay, this is -- I don't know how many
7 times to tell you, we didn't make this. Okay?
8 This is the state's own evidence. The first time
9 they heard this was in my opening statement.

10 (Audio played.)

11 MR. LI: We didn't make that tape. That's an
12 EMT coming in and telling everybody after two
13 people had passed away. Okay? So this is a guy
14 who knows two people have passed away. There are a
15 lot of people sick at the hospital. And he comes
16 in and says, we don't know. We don't know -- he's
17 not saying we do -- but there might have been
18 organophosphates mixed in.

19 So now the state wants to say he doesn't
20 know what he's talking about. He doesn't know
21 anything. That guy doesn't know anything. It's
22 not organophosphates. It's not -- organophosphates
23 are not dangerous. No big deal. You heard
24 Ms. Polk say in her closing argument, we all -- I
25 can't remember exactly how she said it, but

1 something to the effect of we all have organo- --
2 deal with pesticides all the time.

3 Okay. Here's what you heard on the
4 stand. And you actually have this back in
5 evidence. You will have it back in evidence. But
6 it's a textbook about toxicity. And you know what,
7 these poisons are actually lethal. Okay?

8 The CDC, the Center for Disease
9 Control -- I'm sorry -- the Center for Poison
10 Control, reported over 55,000 exposures to
11 organophosphates and 25,000 exposures to
12 carbamates, which are a similar pesticide, in a
13 five-year period. These -- they're listed as,
14 quote, the most frequent lethal insecticides in the
15 United States.

16 So I recall the state asking Dr. Paul,
17 oh, are we talking about India? Are we talking
18 about somewhere else? No. No. It actually says
19 frequent -- most frequent lethal insecticide in the
20 United States. And that document says,
21 approximately eight, averaging in this five-year
22 period, people die a year from exposure to this.
23 Okay?

24 Hunting accidents. I just -- you know --
25 I think it's something like 80 people die a year

1 from hunting accidents. A lot more people hunt.
2 And -- you know -- guns are -- you know -- they're
3 dangerous. They can be dangerous in the wrong
4 hands.

5 So you heard this tape. And the state
6 had this tape. And there were state employees all
7 over the place -- you know -- investigators, EMT
8 personnel, all these kinds of folks there. And the
9 first time they hear it is in court. And so that's
10 one way you're going to remember the state.

11 Detective Diskin, who is the case agent
12 on this case, had never heard it before? Why not?
13 You know, why not? Why not take this -- why not
14 listen to the evidence? Why not ask some of the
15 detectives who were there interviewing who recorded
16 this tape? Detective, what did you hear? Did you
17 hear anything? Did you guys hear anything?

18 Why not ask the detectives? And maybe
19 the detectives who were there would say, well,
20 yeah, some EMT came in and said that -- you know --
21 it was carbon monoxide with maybe some
22 organophosphates mixed in. Why not ask? Why not
23 ask the EMTs? Hey, guys, what do you think? Any
24 problems? Any toxins?

25 You heard Detective Diskin say that he

1 first thought -- on direct examination with
2 Ms. Polk that he thought there might be toxins.
3 Okay? Let's assume that's what he thought for a
4 second, and let's assume that he didn't just look
5 in one direction and one direction only. Let's
6 assume he didn't just think, well, it must have
7 been Mr. Ray because he's a cult leader. Let's
8 assume that for a second.

9 All right. Take him at his word. Why
10 not go, hey, guys, let's bring all the EMTs in?
11 Tell me what's up. What happened? What happened?
12 Wouldn't you want that -- wouldn't you want that if
13 you really wanted to figure out what actually
14 happened?

15 Even Amayra Hamilton, Amayra Hamilton.
16 Remembered that day? She testified. She
17 remembered that tape except she didn't remember the
18 part about organophosphates. That's the one part
19 she didn't remember, even though it's on the tape.

20 Shouldn't you expect a little more out of
21 your government? Shouldn't they look at their own
22 evidence?

23 The second reason why you're going to
24 remember this tape is because the state again and
25 again even, I believe, as of yesterday says that,

1 well, it might not be an EMT, whoever this guy is.
2 Okay. First of all, you remember Dawn
3 Gordon. And I didn't blow this up, but this is a
4 picture that we showed Dawn Gordon and -- on the
5 stand. And we asked her, hey, what was the guy who
6 spoke? Do you remember the guy who spoke? Yeah.
7 He was a guy dressed in black, had a belt, had a
8 bunch of stuff on it.

9 And then we blew this up. And you can't
10 see him too well because obviously I'm standing far
11 away. But we just sort of blew up this guy who is
12 in black who is an EMT. And we said, like that?
13 And she said, yes, like that.

14 Okay. So you've got a witness right now
15 who has told you it's an EMT. Why are we playing
16 games with this? Okay? And what random guy, what
17 random guy comes in and says -- you know -- first
18 of all, just says all this stuff about
19 organophosphates and symptoms and all this stuff,
20 and then says, call 9-1-1 and we'll -- we'll come
21 back. What random guy does that?

22 Okay. And then one more thing. Don't
23 you think people would remember if some idiot just
24 shows up and just decides to come in here and say,
25 hey, I'm going to talk to you about

1 organophosphates? Call 9-1-1, and we'll be back,
2 and he's not an EMT? He's just some idiot who
3 shows up and wants to talk to you. Okay?

4 Do you think maybe some of the people who
5 were there would remember? Yeah. I remember.
6 There was an idiot who came in and said all this
7 stuff. He wasn't an EMT. He's just some guy who
8 shows up and starts talking at us. Why are we
9 playing games with this? You know? Is that -- I
10 mean, why are we playing games?

11 But it wasn't just the EMT guy -- I'm
12 sorry -- the EMT personnel who suspected toxins.
13 Okay? And we've gone through some medical records,
14 and I'll go through a few more with you. But there
15 were doctors who had their hands on the patients.
16 Okay? They were treating these patients, looking
17 at their symptoms while they were literally having
18 their hands on them, not the cold medical records,
19 but their hands on the patients. And they
20 suspected, you remember this word, "toxidrome."
21 You heard it again and again. They suspected
22 toxins, one after another. I'll go through them.
23 But one after the other.

24 Why are we playing games with this? Why
25 are we having Dr. Dickson say -- come in after the

1 fact and say, hey, you know what? All those other
2 guys, they don't know what they're talking about?
3 They had their hands on the patients -- you know --
4 they -- they are -- you know -- some of them even
5 said it wasn't heat stroke.

6 And Dr. Dickson is going to tell you, oh,
7 they don't know what they're talking about.
8 They're unqualified. Really? Every single one,
9 all of them with all of these symptoms? Every
10 single one is unqualified? You got the critical
11 patients all having miosis, pinpoint pupils,
12 foaming of the mouth. No evidence of elevated
13 temperature, no evidence of dehydration. All of
14 these other doctors, this whole list of doctors
15 over here -- Furrey, Tuttle, Cutshall, Stevens,
16 Furrey, Dean, Crowder. They're all idiots? Neff,
17 Kennedy. There is enough -- these are the folks
18 who treated Stephen Ray. They don't know what
19 they're talking about?

20 Is this what you want? So let's talk
21 about it. The state didn't call some doctors.
22 Okay? They called Dr. Brent Cutshall. We'll tell
23 you about him. Here's what he said. Remember,
24 Cutshall treated all of the critical -- critically
25 ill, including Ms. Neuman. And you remember -- I

1 almost called her Dr. Do. Ms. Do and Dr. Cutshall
2 went through all the symptoms. And you recall
3 Ms. Do asked Dr. Cutshall, and before we broke for
4 lunch --

5 Question: Before we broke for lunch, you
6 said that the pinpoint pupils were a red flag to
7 you and the other doctors that you might possibly
8 be dealing with a toxin or the ingestion of a
9 toxin; correct?

10 Answer: Yes.

11 So this is a doctor on the stand under
12 oath who actually treated Ms. Neuman and the other
13 critically ill patients as well in Flagstaff -- all
14 of whom, four for four, four for four, had pinpoint
15 pupils, 100 percent of the folks he dealt with.
16 And based on that and all of the other symptoms,
17 including foaming of the mouth, you remember all
18 that sort -- I don't know. Do we have foaming? Do
19 we not have foaming? All of them sort of trying to
20 say it's not really foaming.

21 And you have Dr. Dickson who wasn't
22 there, say, well, it's not really foaming. But you
23 actually have a doctor, Dr. Nell Wagoner -- he
24 probably made -- maybe Dr. Dickson didn't see this
25 or maybe he wasn't in the court like you were. But

1 we actually have a doctor, Dr. Nell Wagoner, tell
2 you that Liz Neuman's temperature was cold and that
3 she was foaming, foaming. That's the doctor using
4 those terms. Foaming of the mouth.

5 And Dr. Cutshall says -- now, given all
6 these indications, Doctor, as you sit here before
7 this jury, can you tell them with certainty you can
8 rule out organophosphates? Here's what the doctor
9 said: I can't say I can rule it out with
10 certainty. No. I can't. Right there. This is
11 the doctor who treated that patient.

12 Right there you just dropped below.
13 There is a real possibility that something else was
14 happening, that it wasn't this mind-control theory
15 that the state's putting out there. Right there,
16 there is a real possibility.

17 And the state didn't call other doctors
18 either. Okay? And I want you to ask yourselves --

19 MS. POLK: Your Honor, if I may approach?

20 THE COURT: Yes.

21 (Sidebar conference.)

22 THE COURT: Mr. Li, 15.4.

23 But, Ms. Polk.

24 MR. LI: I'm not going to mention the witness
25 list.

1 THE COURT: Okay.

2 MS. POLK: These doctors are the witnesses.

3 This is exactly what this rule is about. These
4 witnesses are equally available to the other side.
5 The state did list these doctors. And to comment
6 and suggest that we are hiding something is exactly
7 what this rule is about. The defense could have
8 called these witnesses.

9 THE COURT: Just a minute.

10 Go ahead, Mr. Li.

11 MR. LI: I think it's just about using the
12 witness list and saying here. There is a witness
13 list, and they didn't call them. That's not what
14 we're doing. These are witnesses they could have
15 called but they didn't call. We don't have a
16 burden.

17 THE COURT: And the way the rule reads is that
18 commenting about somebody being on the list who
19 isn't called, that seems to be the particular
20 matter. Not the fact that it wasn't called.
21 That's how the rule reads, Ms. Polk.

22 MS. POLK: And, Your Honor, it is opening the
23 door to the state's argument that these are equally
24 available to the defense to call.

25 THE COURT: I think Mr. Li understands that.

1 (End of sidebar conference.)

2 THE COURT: Mr. Li.

3 MR. LI: Thank you, Your Honor.

4 So here's a doctor you didn't hear
5 from -- Dr. Tuttle. He was a patient -- excuse me.
6 He treated Stephen Ray, one of the critically ill
7 patients, right here. And you really can't read
8 this very well, but you will have it back there.
9 This is Exhibit 213. And it's -- the page number
10 is 7003. And Dr. Tuttle wrote, Stephen Ray was in
11 a coma of unclear etiology. That means cause. So
12 he's in a coma, and we don't know why. And there
13 was a possible anticholinergic toxidrome. Okay?
14 Again, you can't really read it very well, but
15 that's what it says there. Toxins.

16 So this is one of the doctors who treated
17 Stephen Ray right off the bat. Remember, Stephen
18 Ray doesn't have an elevated temperature. He's
19 only mildly dehydrated. He's got pinpoint pupils.
20 He's got frothy sputum. And a doctor who has got
21 his hands on him and is treating him in the
22 hospital says, I don't know why he's in a coma.
23 And he might be -- there might be a toxidrome
24 involved. And what does that tell you? I mean,
25 what does that tell you? That tells you that there

1 is a real possibility that there was something else
2 going on.

3 Drs. Neff and Kennedy, these are treating
4 doctors who treated Stephen Ray later. And
5 Dr. Neff concludes right here the patient -- I
6 don't know if you can read that. But it says, the
7 patient does not appear to have heat stroke. Does
8 not appear to have had heat stroke. I mean, we're
9 not -- we're not anywhere near here. We've now
10 fallen all the way off the cliff. We're not
11 anywhere near there.

12 You've got a doctor who's treating
13 Mr. Ray -- Mr. Stephen Ray. And he's saying, I
14 don't think he had heat stroke.

15 But that's not all. You got another
16 patient -- another doctor -- this is Exhibit 213 in
17 Stephen Ray's records 798 -- the patient does not
18 appear to have had heat stroke.

19 So this is another doctor, Dr. Kennedy.
20 Again, you can't -- probably can't read it very
21 well. But right there, that's her. She says, I
22 don't think this guy had heat stroke. So you got
23 two doctors now. So we've gone from over there all
24 the way down to two doctors saying, boy, no heat
25 stroke. I don't think so.

1 And then you have the original report
2 when he comes into the hospital. So you got at the
3 beginning, and then you got near the end. At the
4 beginning they thought injury caused accident,
5 poisoning mechanism, chemical poisoning. You have
6 a tape from an EMT who knows the facts. He's seen
7 the sweat lodge. He knows people were in there,
8 that it's hot. He knows all of these things.

9 He comes in -- the state doesn't do
10 anything about this. He comes in and he says,
11 organophosphates maybe. Okay? You have this
12 record here with Stephen Ray. Maybe it's chemical
13 poisoning. You have records after with doctors who
14 are treating Stephen Ray who say -- two of them
15 say, I don't think it's heat stroke.

16 Do you remember what Dr. Dickson said,
17 not ever having met these two doctors, ever? Well,
18 I don't know if they're qualified. Okay. Fine.
19 Let's assume maybe they're not qualified. Maybe
20 they don't know what they're talking about. Okay?
21 Maybe they should be fired. But let's set that
22 aside for a second.

23 Can you believe beyond a reasonable doubt
24 that two doctors who treated this patient, who
25 concluded in their report that he did not appear to

1 have heat stroke -- you can conclude beyond a
2 reasonable doubt that he did have heat stroke? Can
3 you do that?

4 And here's the other amazing thing. The
5 state -- okay? The state didn't ask for these
6 records until January 31st, 2011. This is the
7 request date. Unfortunately, you can't see the
8 "to" line, but this is one of the very early pages
9 of this exhibit, 213. You'll be able to look at it
10 if you want. It's sent to the Yavapai County
11 Attorney's Office, and its request date is
12 January 31st, 2011.

13 These are the records that say -- where
14 two doctors say, I don't think this guy had heat
15 stroke, who was in the sweat lodge, who was in a
16 coma, who had pinpoint pupils, who had foaming in
17 the mouth, all those symptoms. I don't think he
18 had heat stroke.

19 And you know what, the state did not
20 bother to ask for these records until two weeks
21 before you all -- I don't remember which group you
22 were in -- but two weeks before you all came in to
23 perhaps be selected as jurors.

24 And you will remember the state 11 -- I
25 mean, 1/31 -- January 31, 2011. You will remember

1 this date because that's the day the state
2 interviewed Ian Paul. And he said, hey. I've
3 looked at these records, and we're missing stuff.
4 We're missing some records here. I can't make a --
5 I need all the records before I can make a call on
6 this. And so what did they miss? They missed two
7 doctors, not heat stroke.

8 Here's another doctor, Dr. Furrey. He
9 treated Kirby Brown, James Shore, Dennis Mehravar,
10 Sean Ronan, and Kristina Bivens. And he wrote --
11 and you can't read this too well. Sometimes --
12 well -- you know -- these are some of the doctors
13 that treated them at different times. So this is
14 not -- these are not the only doctors who treated
15 them at any given moment. But I just -- these are
16 some of the doctors who treated them. So Dr. Neff
17 and Dr. Kennedy aren't on there, but they are on
18 the exhibit page numbers that I gave you.

19 So here you've got Dr. Furrey. And his
20 records are, we did not have a cause for the
21 symptoms or the other people's symptoms that were
22 in the sweat lodge, including the two people that
23 died. That's what it says. I don't know if you
24 can read it. But this is Exhibit 192, page --
25 Bates page 1811.

1 This is a treating physician who treated
2 five of these patients. And he says -- you know --
3 I know they were in a sweat lodge. And there is
4 all kinds of stuff about the sweat lodge, and
5 there's mass casualties within that sweat lodge.
6 People know sweat lodges are hot. You would think
7 there is evidence in there that people are
8 concerned about heat as a cause of death. You bet.
9 And it follows. It's possible. You bet. Okay?

10 But all of these doctors who have their
11 hands on the patients are saying -- you know -- I
12 don't know what caused this because you're missing
13 the signs and symptoms that go with heat stroke.
14 That's the problem.

15 Then you have Dr. Stevens. He says, we
16 suspect -- he treated Lou Caci. And he says, we
17 suspect there were toxic fumes or carbon monoxide.
18 That's another doctor who is at the scene, who is
19 dealing with a patient, who says based on these
20 signs and symptoms, yeah, it could be heat. You
21 bet, because he's in a sweat lodge, of course.

22 And you heard Dr. Paul testify, yeah, you
23 bet people were affected by the heat, of course.
24 That's what happens in sweat lodges. Okay? But
25 there is something else going on, something layered

1 on top. That's why you find these doctors, like
2 Dr. Stevens, saying we suspect that there were
3 toxin fumes or carbon monoxide.

4 Ladies and gentlemen, I don't know how
5 many doctors that is, but that's a lot of doctors
6 that are taking you step by step, by step, by step,
7 by step, by step, by step, by step, by step away
8 from what the state thinks it's proved to you. A
9 lot of doctors who had their hands on these
10 patients who have taken you far, far away.

11 The only doctor who didn't have his hands
12 on any of these patients and who thinks all of
13 these doctors are wrong, they don't know --
14 remember he said, I had the advantage of looking at
15 all the records before I came to my conclusion, and
16 I know better because none of these guys looked at
17 all the records, and I did. That's Dr. Dickson.

18 He's the doctor who knows more than all
19 of the other doctors who had their hands on their
20 patients -- on the patient. And we'll get to the
21 medical examiners in a second. But he's the guy
22 who knows.

23 Except there is a little problem. And I
24 don't know if you caught this. But he actually
25 also didn't have Stephen Ray's records when he

1 wrote his report. He wrote his report in early
2 January. I think it's in evidence. I'm not sure.
3 But he wrote his report in early January. And the
4 state didn't even ask for Stephen Ray's records.
5 That's with the two doctors saying not heat stroke.

6 He didn't even see those records before
7 he wrote his report. But he actually -- even
8 though he told you, first, yeah, I looked at all
9 the records. It's kind of -- you know -- I'm not
10 saying -- he wasn't fibbing. All right. He just
11 didn't remember. He didn't actually look at all
12 the records. He didn't.

13 Then there is Dr. Dean and Dr. Crowder.
14 They've not diagnosed anybody with heat stroke.
15 You can go through all the records for all these
16 folks down here. They didn't have heat stroke.
17 And, frankly, if they did, why are they going to
18 the hospital at 9:00 o'clock -- you know -- four
19 hours after the sweat lodge ceremony? They don't
20 have heat stroke.

21 They're not feeling well. They have
22 maybe heat related stuff. There is -- you know --
23 there is any number of things that could be going
24 on with these folks. But they're showing up four
25 hours later. It could be that there is some fume

1 that got in the head too. Okay? So we are way,
2 way far away from reasonable doubt.

3 But here's the problem. Here's the
4 problem: It's not just that Detective Diskin and
5 the state and all these folks didn't talk to all
6 these treating doctors. You heard that over and
7 over and over again. They really didn't check in
8 with these doctors. It's not that -- that's not
9 the only problem.

10 Here's a real big problem: They never
11 gave any of this information. They never had these
12 doctors talk to the medical examiners --
13 Dr. Mosley, Dr. Lyon -- who conducted the autopsies
14 in this case. That's important because you heard
15 from two Arizona state employed medical examiners.
16 Their job, as you know, is to determine cause and
17 manner of death. Okay? So their job -- this is
18 their job to figure out why people died.

19 And then their job is also to get on the
20 stand and tell you, ladies and gentlemen, under
21 oath why folks died. What was the cause and
22 manner? That's their job. They're paid by
23 taxpayer dollars. That's what they get paid to do.

24 First one you heard from was Dr. Lyon.
25 He signed out the autopsy for James Shore and Kirby

1 Brown. He's the one who said that dehydration --
 2 excuse me. He said -- he was the one that said he
 3 sent out the vitreous samples for testing because
 4 it was very, very important.
 5 And he agreed on the stand that whenever
 6 those tests came back, these patients did not have
 7 dehydration. Didn't have it. He also told you
 8 that no one from the state had ever told him that
 9 other participants had pinpoint pupils.

10 Question: You weren't told that anyone
 11 had pinpoint pupils?

12 Answer: Not that I recall.

13 Under oath in front of you. He wasn't
 14 told that other patients had frothy sputum, foaming
 15 mouth.

16 Question: You weren't told that people
 17 at the scene were foaming; correct?

18 Answer: Not that I recall.

19 He also agreed that pinpoint pupils and
 20 frothy sputum were tell-tale symptoms of toxic
 21 exposure. He also told you that he was not told
 22 that the ER doctors suspected toxins. He also was
 23 not told that an EMT had announced on the night of
 24 the accident that there might be organophosphates.
 25 He was not told that.

1 And I don't know if you remember this,
 2 but Ms. Do went through this whole thing with him.
 3 Were you told this? Were you told this? Were you
 4 told this? Were you told this? And he was getting
 5 a little -- no, I wasn't. No, I wasn't. No, I
 6 wasn't. Your recollection will govern. Okay?

7 But there was a sense that, wow, I wasn't
 8 told all that. And if you have any question about
 9 that, he was asked, if someone had --

10 Question: If someone had come to you on
 11 the day you did your autopsy that there was a
 12 statement suggesting organophosphates as a possible
 13 cause, what would you have done at that moment?

14 Answer. And this is really, really, really
 15 important.

16 Answer: That would have been included in
 17 the test request.

18 Okay. If somebody had just bothered to
 19 look at the evidence or have a team meeting, get
 20 everybody together and say, what do we know? Come
 21 on. Everyone -- you know -- gather up. Let's get
 22 a chart out here. Everybody tell me what you know.
 23 Tell me what you know. This is a horrible
 24 accident. Let's see if it's a crime. Let's see if
 25 it's just an accident. Let's try and figure out --

1 maybe we can help treat people or something. I
 2 don't know. Let's figure out what happened.
 3 Everybody saddle up. Let's get together. Okay?
 4 Had somebody done that, you would have
 5 had somebody say hey. I'm the EMT or whoever it is
 6 saying, yeah, I'm -- you know -- we think it might
 7 be organophosphates or something else mixed in.
 8 You'd have all these doctors come in and say,
 9 hey -- you know -- here's what we saw. We're
 10 concerned there might be some toxins involved.
 11 Okay? And then, all right. Let's get all this
 12 information together. Let's send it to the medical
 13 examiner and say, hey, Dr. Lyon, test. Take those
 14 samples and test.

15 And Dr. Lyon could have said, okay. I
 16 will. And that's what he said he would have done
 17 had he been told. But the evidence was not
 18 preserved. He was not told. And so these blood
 19 samples, basically, are useless. And we'll get to
 20 that.

21 And so as a consequence, you'll never
 22 know. You, the jury, will never know. And we'll
 23 get to this. But, boy, that's not something you
 24 can hold against Mr. Ray. There's a -- there's
 25 a -- the law is that if you want to hold it against

1 somebody, if you want to hold it against somebody
 2 for the failure to preserve evidence or the failure
 3 to circle up and everybody take a knee and let's
 4 talk about what happened, you want to hold somebody
 5 accountable for that, it isn't Mr. Ray. You got to
 6 hold the government accountable for that.

7 Because Mr. Ray can't pick up the phone
 8 and call all these people and say, circle up.
 9 That's not going to happen. Detective Diskin can.
 10 And the prosecutors could, but they didn't.

11 And here's what Dr. Lyon says as a result
 12 of that: And --

13 Question: And because you didn't test at
 14 the relevant time, you cannot exclude
 15 organophosphates as a cause?

16 Answer: Correct.

17 This is the guy who actually did the
 18 autopsy on two of the decedents. The state needs
 19 to prove all the way up to here. We've got the guy
 20 who did the autopsy. And he's saying, I can't rule
 21 it out. We've dropped way past there. Okay?

22 Whatever Dr. Dickson says -- and all due
 23 respect to him, he seemed like a nice guy. All due
 24 respect to him, you got the guy who is actually the
 25 medical examiner, whose salary is actually paid --

1 all of you live in Yavapai, so all of you are
2 paying his salary. Okay? And this guy is saying,
3 I can't rule it out because I wasn't told, and I
4 couldn't test, so I can't rule it out.

5 We're done. That's two people. That's
6 two counts. We're done. That's over. It's not
7 beyond a reasonable doubt. They can't prove it.
8 We're done.

9 Now, the state is going to say, well, you
10 know what. He still thinks that it was heat
11 stroke. You remember he got on the stand. He
12 still thinks it's heat stroke. Okay? But you'll
13 recall what he actually said was that it's 51/49
14 percent. He can't rule out organophosphates. It's
15 51/49 percent.

16 Question: 59/41?

17 Answer: Correct.

18 Question: And so, as you sit here,
19 Dr. Lyon, can you tell the jury whether you believe
20 the cause of death in this case is heat stroke
21 beyond a medical -- reasonable medical degree of
22 certainty?

23 Answer: No.

24 Okay. So here's where we are. Right
25 here. We are many, many feet away from where we

1 need to be. And that's the state's own medical
2 examiner, paid for by you guys. All of your tax
3 dollars go to this guy. That's nowhere close to
4 beyond a reasonable doubt.

5 But the state wants you to say, hey, you
6 know what. Ignore the medical examiner that you
7 all pay for. He doesn't -- he doesn't know what
8 he's talking about. He's just a medical examiner.
9 Ignore him. Really?

10 Let's talk about Dr. Mosley, the other
11 medical examiner, who is from Coconino. I don't
12 know if county tax dollars pay for it, but maybe
13 you do pay for him. Maybe you don't pay for him.
14 He's also a state employee. He's the guy who got
15 on the stand and said -- and remember this.
16 Dr. Paul. His resume is impeccable. This is the
17 guy that the state says has no credibility at all.
18 Dr. Paul. A guy who did, I think, three years --
19 and we'll get to his resume in a second.

20 So he did three years at a clinic -- or a
21 hospital associated with Harvard, Harvard
22 University. Okay. No credibility at all. He's a
23 state employee who works with the police and the
24 prosecutors. No credibility at all. He's a guy
25 who's never, ever, ever worked on a criminal

1 defense case ever. No credibility. He doesn't
2 know what he's talking about.

3 Dr. Mosley says, impeccable. Dr. Mosley,
4 he was being facetious. I'll give you that. But
5 he overmounted it because -- this is a little
6 funny -- he said, oh, it's the voice of God. He
7 said that if you looked and did a deep background
8 check, you might find that he's -- that he might be
9 allergic to kryptonite and be able to see through
10 lead. Okay? And obviously he was being facetious.
11 And I'm not saying he's superman. And I'm surely
12 not saying he's the voice of God. But -- you
13 know -- he's a serious doctor.

14 Okay? And Dr. Mosley said, yeah. That
15 guy's a serious doctor. And Dr. Mosley, because he
16 read Dr. Paul's report, said he needed to
17 reconsider. Okay? He said, that he couldn't rule
18 out organophosphates.

19 And here's the questioning:

20 And based on your review of Ms. Neuman's
21 records, which was prompted by Dr. Paul's report,
22 you have reached some doubts about your
23 conclusions; correct?

24 Answer: Correct.

25 Question: You reached a conclusion based

1 on your review of her records that there are signs
2 and symptoms inconsistent with heat stroke and
3 hyperthermia? These are the pinpoint pupils, the
4 lack of dehydration, lack of elevated temperature,
5 foaming of the mouth?

6 Answer: That's correct.

7 Question: There are signs and symptoms
8 in her medical records that are consistent with
9 toxicity, including organophosphate toxicity;
10 correct?

11 Answer: Correct.

12 Question: What we are calling a
13 cholinergic toxidrome; correct?

14 Answer: Correct.

15 Question: Based on those signs and
16 symptoms, you reached an opinion today, as you sit
17 here, that you cannot exclude organophosphates as a
18 cause -- contributing cause or cause of death;
19 correct?

20 Answer: That's correct.

21 So this is a guy who started off the case
22 with it's hyperthermia, which is his way of saying
23 heat stroke. Okay? That's where he starts off.
24 And the state would have you believe you're here.
25 But now he's saying, well, I can't rule it out

1 because I looked at Dr. Paul's report. And, boy,
2 that's given me some doubts. And, shoot. I can't
3 rule it out because look at these signs and
4 symptoms. They're not consistent with heat stroke
5 and consistent with toxicity.

6 And then he says:

7 Question: What you are telling this jury
8 today is based on your reevaluation, reevaluation,
9 of the evidence? You do believe that toxicity was
10 in play; correct?

11 Answer: Correct.

12 Question: The toxicity that could be in
13 play based on the signs and symptoms is
14 organophosphates; correct?

15 Answer: That's among the toxicities that
16 are possible.

17 We don't know. We don't know. Let me
18 ask you why. You want to know why? Because they
19 didn't look at their own evidence. They didn't
20 take the blood and test it.

21 Now, Dr. Dickson said, oh, there is no
22 test anywhere that works for organophosphates.
23 It's all just sort of theoretical, and you really
24 can't test for that. And I have an answer to that
25 I'll give you in a second. But let me just point

1 one thing out. Dr. Lyon, who is a medical
2 examiner, whose job it is to determine cause and
3 manner of death, told you under oath as a state
4 employee, paid for by your tax dollars, he said, if
5 you had told me somebody talking about
6 organophosphates, I would have included that in the
7 testing. Okay?

8 But we don't know because the state
9 didn't look at their own evidence. So there is a
10 real possibility, a real possibility, that
11 something else was going on. And you all are bound
12 by oath not to ignore that. You can't ignore that.
13 They want you to, but you cannot ignore it, on this
14 testimony alone. These are the three people who
15 passed away. They were looked at by two different
16 medical examiners who had their hands on them, who
17 did the work, were medical examiners. They say
18 they can't rule it out.

19 On that testimony alone, on that alone,
20 you should find -- you can find that the state has
21 failed to prove beyond a reasonable doubt.

22 You should find the state has failed to
23 prove beyond a reasonable doubt that there wasn't a
24 superseding, intervening cause, like a toxin, like
25 these two medical examiners say they can't rule

1 out.

2 But that's not all. And now we'll get to
3 Dr. Paul, who the state says has no credibility at
4 all. Dr. Mosley, a medical examiner, said, when
5 you told us --

6 Question: When you told us on April 18th
7 and 19th that Dr. Paul could be right -- that
8 Dr. Paul's opinion could be right, you are
9 confirming that statement again today; correct?

10 Answer: Correct.

11 So here's the state's own doctor telling
12 all of you folks that Dr. Paul, who the state kept
13 on referring to as the defense doctor, the guy with
14 no credibility at all, the defense doctor -- here's
15 a state doctor saying, yeah, I'm confirming that.
16 I'm confirming that Dr. Paul could be correct.

17 On that alone we've fallen way past, way
18 beneath, reasonable doubt.

19 And I need to -- I'm going to return to
20 Dr. Paul. This brings us all to Dr. Paul. I'm
21 going to repeat, we don't have any burden at all.
22 Okay? The state has all of the burden. That's --
23 that's the way our constitution works. That's the
24 way all of you would want it if you or your child
25 were in this situation. Okay?

1 So we believe that the state should
2 embrace that. And if they run away from that,
3 don't let them. Hold them to that. We didn't have
4 to prove anything, but we called Dr. Paul.

5 And Dr. Paul came in and he testified.
6 And you remember him because, as I said, he's a
7 medical examiner from the State of New Mexico. He
8 works with the police and prosecutors. That's his
9 job. He's just like Dr. Lyon and Dr. Mosley.
10 That's his job. That's what he does.

11 The first time he's ever testified in a
12 defense case. He's a board certified emergency
13 room doctor, board certified. So he's kind of like
14 Dr. Dickson in that they're both board certified to
15 do emergency work. Oh. But he's also board
16 certified as a pathologist, a forensic pathologist,
17 in other words, as a medical examiner. He's also
18 board certified as an anatomic pathologist, so he
19 can do both.

20 He can do forensic, where you do the
21 analytic work and you figure out why did somebody
22 die; and he can do the ER work, where, okay, we
23 got -- you know -- let's talk a second about ER and
24 what ER docs do as opposed to what forensic doctors
25 do.

1 ER docs. Here's what happens: A patient
2 comes rolling in. And it's an adrenaline job --
3 you know. Okay. I'm seeing this. I'm seeing
4 this. I'm seeing this. You got to stabilize
5 and -- you know -- get him on his way to -- you
6 know -- make sure that the patient doesn't die and
7 get him on the way to the specialist. That's what
8 an ER doc does.

9 It is -- you know -- highly valuable,
10 very important. I'm not disparaging it at all.
11 But it's not a forensic pathologist. It's not a
12 guy that sits there and does tests and figures out
13 what's going on and what the -- you know -- he's
14 not somebody who works backwards and figures out
15 what happened -- what happened.

16 So we'll talk a little more about
17 Dr. Paul, who is both. Dr. Mosley said his resume
18 was impeccable. He got his masters from
19 Georgetown. He got his M.D. from McGill in Canada,
20 which is, basically, the Harvard of Canada. It's
21 ranked by U.S. News and World Report 18th in the
22 world, so we're talking about Oxford and -- you
23 know -- Harvard and all these places. And this
24 doctor went to one of those medical schools.

25 He did his residency at a hospital

1 associated with Brown University, which is another
2 Ivy League school. He did his ER work at Boston
3 Medical Center, one of the finest medical centers
4 in the country. He did three years of his
5 pathology residency at a medical center associated
6 with Harvard Medical School.

7 He teaches at the University of New
8 Mexico Medical School, one of the finest in the
9 nation. He lectures about pulmonary edema and --
10 I'm sorry -- pulmonary diseases, lung diseases.

11 Okay. So when he talks about what's
12 going on in the lungs, this is a guy who knows what
13 he's talking about. He's not making this up. All
14 right? The state wants you to think that this guy,
15 this doctor with that resume -- okay? -- who works
16 for the State in New Mexico with prosecutors --
17 that's his job. Okay? The state wants you to
18 think he'll say anything. He'll say anything. He
19 has no credibility at all.

20 Dr. Paul actually reviewed all of the
21 medical records. He didn't guess. He didn't look
22 up Wikipedia for things. He looked at the medical
23 records. And when he didn't have them, he asked
24 for them. He said, you know what. We're missing
25 some medical records. And so -- you know -- this

1 is the date he was interviewed, right there.

2 And so he says -- you know -- we're
3 missing medical records. I need some medical
4 records. And that's when the state gets around to
5 asking for these. And these, as I said before, are
6 the medical records that show that Stephen Ray, one
7 of the critically ill right here, does not appear
8 to have had heat stroke.

9 And, again, another doctor, Dr. Kennedy.
10 The patient does not appear to have had heat
11 stroke. That's the doctor that the state says has
12 no credibility at all, the doctor who actually
13 asked for records when he can't find them, the
14 doctor who when he asks for the records finds out
15 that here's what's inside those reports -- you
16 know -- so we can just ignore all of that, that
17 this guy would say anything to help me out, to help
18 Mr. Ray out. He'd say anything.

19 The guy with an education like that who
20 works for the state. You know what happens if
21 you're the kind of doctor who will say anything and
22 you work for the state. I hope you get fired.
23 Okay? I mean, saying anything for the defense, I
24 hope you get fired because that's not what you're
25 here to do.

1 You're here to tell the truth as you see
2 it, Doctor. Just like Dr. Lyon and Dr. Mosley.
3 That's what you're supposed to do. Come in here,
4 look at the records, do your best, tell this jury
5 the truth. That's all you got to do.

6 And the state wants to say, oh. He's a
7 liar. He doesn't know what he's talking about. Is
8 that credible? Is that what you want -- is that
9 how you want your government to be? Anybody who
10 disagrees with them is just a liar. You know, this
11 guy doesn't know anything.

12 You should believe -- you know -- Beverly
13 Bunn -- you know -- a dentist. Remember the state
14 calling Beverly Bunn. You know, now, Doctor, dah,
15 dah, dah, dah, all these questions. Doctor,
16 blah, blah, blah, blah, blah. Dr. Beverly Bunn,
17 Dr. Beverly Bunn. I'm not disparaging dentists.
18 They are very important folks. But they are not
19 forensic pathologists. I mean, it's not the same
20 thing.

21 So we should listen to Beverly Bunn about
22 heat stroke, which the state did ask her a bunch of
23 questions about heat stroke, but we shouldn't
24 listen to a forensic pathologist with that kind of
25 resume.

1 All right. What did Dr. Paul tell us?
 2 What did he tell us? He told us that the evidence
 3 was inconsistent, inconsistent with heat stroke;
 4 that the patients who died, the evidence was
 5 inconsistent with heat stroke. Why? Because you
 6 need a temperature.

7 We're not talking about desecrated
 8 corpses out in the desert. That's why the forensic
 9 pathologist can't always get a temperature, because
 10 people have been dead a long time.

11 We're talking about patients who were in
 12 the hospital. Okay? And what he's telling us is
 13 you don't have evidence, clinical evidence,
 14 objective facts of elevated temperature. You don't
 15 have objective facts that support that.

16 Secondly, you don't have objective facts
 17 that support dehydration. In fact, you have the
 18 opposite. You have normal, normal. So, again,
 19 what is the state saying about dehydration? It
 20 doesn't matter. It does matter. It doesn't
 21 matter. It does matter. You can rehydrate dead
 22 people. You can -- you can -- by pumping normal
 23 saline -- one liter of normal saline into your
 24 body, you can change the chemistry in your eye when
 25 every other doctor says, no. I don't think so.

1 Dr. Paul said you did have evidence of
 2 heat illness. Okay? Because that's the facts.
 3 You know, there were people who got sick and threw
 4 up. He's not here to just -- you know -- say
 5 whatever I want him to say or whatever Ms. Do wants
 6 him to say or whatever is helpful for the defense.
 7 He's here to tell you the best as he can what his
 8 diagnosis is.

9 And he says, yeah, you know what. They
 10 had some -- they had some symptoms on the mild end
 11 of the heat-illness spectrum. They had nausea.
 12 Some had vomiting. Some had headaches some had
 13 syncope, fainting, what has also been called by the
 14 state as passing out. Okay?

15 Dr. Paul says yeah -- you know -- I saw
 16 symptoms of that. But what I didn't see is heat
 17 stroke. He said there was no clinical or medical
 18 evidence supporting the conclusion of nonexertional
 19 heat stroke. And he said there was evidence
 20 consistent -- sorry -- inconsistent with
 21 nonexertional heat stroke.

22 So not only do you not have evidence
 23 consistent with heat stroke, you have evidence
 24 inconsistent with heat stroke. And what were
 25 those? They were pinpoint pupils. They were early

1 pulmonary edema. Okay. Pulmonary edema. This is
 2 a doc whose specialty is lungs. Okay? So he knows
 3 a heck of a lot about how your lungs can go wrong
 4 because that's what this guy does for a living.

5 He says, when you have heat stroke --
 6 pulmonary edema, that is the fluid created by the
 7 lungs, not spit going down your trachea, but
 8 created by the lungs. Pulmonary edema is a late
 9 symptom in heat stroke. It's not something that
 10 happens like that. Okay? It's a late symptom.

11 And what these patients had was early,
 12 frank pulmonary edema, which means early,
 13 expressed, you can tell, pulmonary edema. That's
 14 inconsistent with heat stroke. And the frothy
 15 sputum that Dr. Wagoner told you about, a doctor
 16 told you about, those are all symptoms that are
 17 inconsistent with heat stroke.

18 There was early respiratory failure in
 19 the decedent, and it was transient in Tess Wong,
 20 Stephen Ray, and Sidney Spencer. That's also
 21 inconsistent with heat stroke. And then he said,
 22 you had coma, coma, early coma. That's also
 23 inconsistent with heat stroke. Early coma. We're
 24 not talking passing out. There is a difference
 25 between coma and passing out.

1 Passing out, as Dr. Paul explained to
 2 you, is -- can happen when you're -- what they call
 3 "vasodilation." And I've actually had it happen to
 4 myself, which is when you're really hot, your blood
 5 shunts away from your organs, including your head
 6 and out to your extremity so that you can cool.

7 And if you get up too fast or if it's --
 8 you're just too hot and that happens, you can pass
 9 out. Okay? Because you're not getting enough
 10 oxygen to your brain, you pass out. That's called
 11 "syncope." It's called "fainting." That's a big
 12 difference between fainting and coma. Okay?

13 Coma, as Dr. Paul explained to you, is
 14 when your -- A, your blood chemistry is totally
 15 wrong because you're dehydrated and your brain
 16 swells. That's a totally different symptom -- or
 17 totally different symptom and mechanism. And the
 18 other way is through physical damage to the brain.
 19 Okay? So literally it's so hot that brain cells
 20 are literally dying on the spot. That's a big
 21 difference between fainting and coma. Okay?

22 So Linda Andresano for a second -- let's
 23 discuss her for just a second. She fainted. When
 24 she came out, she recovered. Ami Grimes fainted
 25 when she came out, and she recovered. Okay?

1 Liz Neuman. She had a coma. That's a
 2 totally different thing. So when the state tries
 3 to blur the line between those medical issues,
 4 don't let them because these are very different
 5 mechanisms. They're not the same thing.
 6 Stephen Ray had a coma of unknown
 7 etiology. We don't know why. And what he told you
 8 is based on all these signs and symptoms, he can't
 9 reach a medical diagnosis as to what, in fact,
 10 caused these folks to die because you don't know.
 11 But he suspects a toxicity. And if you
 12 were going to look for a toxin, you sure would look
 13 at organophosphates because these signs and
 14 symptoms are consistent with organophosphate
 15 poisoning. They are consistent with
 16 organophosphate poisoning.
 17 It's not a house of cards. This is a
 18 doctor who is telling you, boy, I would have looked
 19 at that. And that's exactly the same thing
 20 Dr. Lyon told you. Boy, I would have looked at
 21 that. Are you kidding me? You told me on the
 22 night that I did my autopsy that there were people
 23 talking about organophosphates, you bet I would
 24 have tested for that.
 25 And Dr. Paul is not criticizing anybody.

1 He's not saying, hey -- you know -- these
 2 doctors -- the treating doctor did something wrong
 3 or medical examiners didn't do something. They
 4 just didn't know. But Dr. Paul absolutely would
 5 have tested for organophosphates. But it's way too
 6 late now. Way too late.
 7 And the state says, oh, that's convenient
 8 for us. Okay? So I made up this story? I made up
 9 Exhibit 742? I just made that up? I made up all
 10 those medical records I showed you? We just made
 11 that up. It's really convenient to us? We're just
 12 going to fake it?
 13 That alone, Dr. Paul's testimony alone,
 14 gives you reasonable doubt. Alone.
 15 Now, I just want to correct the record on
 16 a couple of things. Ms. Polk said that in order
 17 for you to find organophosphate poisoning, in order
 18 for a doctor to find that, you got to see all of
 19 the signs and symptoms, every single one. In those
 20 SLUDGEM, DUMBELLS, you got to find every single
 21 one.
 22 That's just not what the doctors said.
 23 Not any of them said that. This is Dr. Dickson,
 24 the state's own doctor. The jury knows --
 25 Question: The jury knows that there are

1 various signs and symptoms that you will see under
 2 this toxidrome. This is organophosphates; correct?
 3 Answer: Okay. Yes.
 4 Question: My question is -- I want to
 5 help -- I want you to help them understand. Are
 6 you always going to see diarrhea, urination,
 7 miosis, bronchorrhea, bronchospasm, emesis,
 8 lacrimation, salivation every time you have
 9 organophosphate poisoning? Answer -- the state's
 10 own doctor:
 11 Answer: No.
 12 So when the state gets up here in front
 13 of you and tells you, each and every one of you
 14 jurors, who have been sitting here in judgement of
 15 Mr. Ray -- when the state gets up here and tells
 16 each and every one of you you got to see every
 17 single symptom, it's a box. That was what she
 18 said. It's a box. And every single symptom has to
 19 be in there, otherwise it's not organophosphates.
 20 It can't be organophosphates unless you have every
 21 single symptom. That's what the state said in
 22 their closing arguments yesterday.
 23 Answer -- this is Dr. Dickson, the one
 24 doctor they want you to listen to except for this.
 25 Answer: No.

1 Your Honor, we --
 2 THE COURT: Mr. Li, if you have about 15 more
 3 minutes.
 4 MR. LI: Your Honor, if I can continue. I
 5 don't want to kill you guys. All right. And,
 6 again, thank you. We always get the late shift.
 7 I'm going to move from that answer, no,
 8 to Dr. Dickson. Let's talk about Dr. Dickson now.
 9 I've asked you this a bunch of times. But why does
 10 the state need to hire Dr. Dickson? Don't you have
 11 doctors? Don't we have medical examiners whose job
 12 it is to tell jurors, just like you, why folks
 13 died? Isn't that their job?
 14 Why did we hire this guy from -- this ER
 15 doctor? Is it because the state's own medical
 16 examiners say they can't rule out other causes of
 17 death? Is it because the state's own medical
 18 examiners say you bet I would have tested for
 19 organophosphates had I known? Is it because the
 20 state doctors say, well, I think it's heat stroke
 21 but somewhere around here, and I can't rule out
 22 organophosphate poisoning? Is it because the
 23 state's doctors, medical examiners, basically, tell
 24 you, you know what? There is reasonable doubt,
 25 ladies and gentlemen? I don't know what else to

1 tell you? There is reasonable doubt?
 2 You know, I forgot to mention one part of
 3 this. So remember when I quoted Dr. Lyon about the
 4 51/49 percent and that he couldn't rule it out,
 5 that he could not opine, he could not give the
 6 opinion that it was heat stroke beyond a medical
 7 degree of certainty, and he said no?

8 The next question was: And you
 9 understand that in a criminal case involving
 10 homicide, the burden for the jury is beyond a
 11 reasonable doubt?

12 And Dr. Lyon answered, correct.

13 Question: And those two are not the
 14 same; correct?

15 Answer: Correct.

16 That's what he's telling you. You got
 17 doubt. That's what he's telling you. So is that
 18 why the state needs to go hire another doctor to do
 19 these other doctors' jobs? Is that why?

20 Anyway, Dr. Dickson was hired, and he was
 21 paid some money. The exact same amount of money,
 22 the exact same amount of hourly rate, as Dr. Paul.
 23 So he's hired. But I got to tell you, ladies and
 24 gentlemen, the difference ends there. They
 25 were paid the same rate, but I submit that we got a

1 better deal than the state did.

2 And it's critical to understand the
 3 difference between ER doctors and medical
 4 examiners. It's critical. And the critical
 5 difference is something called "expertise,"
 6 "specialization." Okay?

7 So if any of you folks ever have a
 8 problem with a patent or a will or something like
 9 that -- you know -- don't call me. Don't call Tom.
 10 Don't call Truc. We know something about them.
 11 I've done cases for patents before in my career.
 12 I've looked at wills -- you know. But if you came
 13 and called me up and said, hey, Luis, I want to --
 14 I need some help with my patents because I've got
 15 this great invention and I want to make sure all my
 16 rights are protected. I'd say, hey, folks. I got
 17 to be honest with you. I can tell you a little
 18 bit. I can probably steer you in the right
 19 direction. But don't call me. Okay? That's not
 20 my specialty. I don't know. And I'd be honest
 21 with you. That's not my specialty.

22 It's like Dr. Paul tells you, hey, you
 23 know what. I'm not a toxicologist. I can tell you
 24 a little bit about it, but I'm not going to pretend
 25 to be a toxicologist. I'm not going to go on

1 Wikipedia and just start reading from Wikipedia and
 2 print that and pretend to you that I know what I'm
 3 talking about. That's not what I would do if you
 4 called me up and asked for advise on wills. And
 5 there's a difference between medical examiners and
 6 ER doctors. There just is.

7 Ian Paul happens to be both. Okay? But
 8 there is a difference between them. I'll give you
 9 an example. You know, my mom is a cancer
 10 researcher. She is really, really smart. She does
 11 genetic stuff. Okay? I don't even understand what
 12 she does. She's really, really smart. But you
 13 should not call her up and ask her what the
 14 pathophysiology is of heat stroke. You just
 15 shouldn't do that. You should not call her up and
 16 say, hey, if somebody dies of organophosphate
 17 poisoning, dies, what signs and symptoms should you
 18 find in the autopsy? She's not going to know.

19 It's not because she's not a smart lady.
 20 It's not because she can't go on the Internet and
 21 find some of these answers. But it's just that's
 22 not what she does. Okay?

23 So people, just like lawyers, should stay
 24 within -- you know, if they're going to talk to
 25 you, they should stay within their area of

1 expertise, what their specialization is. And
 2 that's the difference between Dr. Paul, who the
 3 state says has no credibility at all, none, and
 4 Dr. Dickson, who has all the credibility in the
 5 world, according to the state.

6 Except for that one answer when he says,
 7 well, should you see all the signs and symptoms?
 8 When he says no, that's the one answer you should
 9 disregard because actually that's the only time he
 10 got it wrong. But everything else you should
 11 listen to and you should not listen to Dr. Paul.

12 And even Dr. Dickson had to admit that
 13 people who specialize he would defer to. Okay?
 14 Here's what he said. He said he'd defer to the
 15 medical examiners.

16 QUESTION: And so whatever conclusions or
 17 opinions the state's medical examiners have reached
 18 regarding the cause of death, you would defer to
 19 them since they are the state's medical examiners
 20 in this case, yes?

21 Answer: Yes.

22 Well, thank you. Remember, they are the
 23 medical examiners. And we've heard what they said.
 24 Dr. Lyon said, I'm about here for heat stroke, but
 25 I sure can't rule out organophosphates. And not

1 only that, boy, if you had told me about
2 organophosphates, I would have tested for them.

3 And unlike Dr. Cutshall, Dr. Dickson
4 didn't actually treat Ms. Neuman. Okay. And
5 Dr. Dickson said he'd defer to Dr. Cutshall, who
6 you heard from, to Dr. Cutshall's opinion.

7 Question: And so if that doctor in the
8 ICU who you believe would have the most available
9 information, you would defer to his opinion about
10 the patient he treated; correct?

11 Answer: Yes.

12 Well, thank you. Okay. Good. Because
13 you're going to defer to the guy who is actually
14 working on the patient. And you're not going to
15 call that person unqualified, unlike Drs. Neff and
16 Kennedy, who said it wasn't heat stroke, but -- you
17 know -- those guys don't know what they're talking
18 about, and they haven't met them -- haven't
19 actually met that patient ever. But they don't
20 know what they're talking about.

21 But okay. Fine. Fine. If you really
22 want to push me on it, I will admit that, yeah,
23 I'll defer to Dr. Cutshall, who actually treated
24 one of the patients.

25 And what did Dr. Cutshall tell you? He

1 said he could not rule out organophosphate
2 poisoning. That's what Dr. Cutshall told you. He
3 could not rule it out.

4 So even the state's expert that they
5 really want you to believe every single word he
6 says, well, ask yourselves when Ms. Polk gets up,
7 because she's going to get another chance to talk
8 to you. Ask Ms. Polk whether we should listen to
9 Dr. Dickson there.

10 Should we listen to Dr. Dickson when he
11 tells us he would defer to the medical examiners?
12 Should we listen to Dr. Dickson when he says he
13 would defer to Dr. Cutshall, who actually treated
14 the patient? Should we listen to him there, or
15 should we just selectively pick the parts that we
16 like and then disregard the rest?

17 Ask the state, what is the story? What
18 do we want to know? Should we listen to the parts
19 where Dr. Cutshall -- or Dr. Dickson says, you
20 don't need all the symptoms, you won't see all the
21 symptoms, or should we not? What's the state's --
22 oh. And here's another thing Dr. Dickson said.

23 There are signs and symptoms that can be consistent
24 for both heat stroke and organophosphate poisoning.

25 Now, I'm going to tell you -- and your

1 recollection will govern. But I seem to recall
2 Ms. Polk saying that there's no way these things
3 can be confused. It's completely different.

4 But here's Dr. Dickson saying, there are
5 signs and symptoms that can be consistent to both.
6 I agreed with that yesterday. This is when he was
7 getting a little testy. He says, there are signs
8 and symptoms. And we did a whole list of heat
9 illness and organophosphates. There are overlap
10 absolutely of symptoms.

11 So should we ignore that part too, or
12 should we just cherry pick the parts that you want
13 to convict Mr. Ray of manslaughter? Should we just
14 do that or should we actually listen to their own
15 doctor under oath who had to admit that there is a
16 consistency between symptoms? He also agreed that
17 you could not rule out organophosphates.

18 Now, I'm not going to mislead you about
19 this. He said -- he strongly said to you that,
20 yeah, while he couldn't rule out organophosphates,
21 it was really, really, really unlikely, one in a
22 billion or something like that. He pulled that
23 out. One in a billion.

24 So where he differed with these doctors,
25 these other doctors, all these treating doctors

1 here who said there was some toxins, where he
2 differed with the medical examiners who said -- you
3 know -- there is no signs and symptoms of -- we
4 don't have an elevated temperature. We don't have
5 dehydration. And we can't rule out
6 organophosphates.

7 Where he differed with the fact that
8 everybody can't rule out organophosphates is the
9 degree. So whereas everybody else is somewhere
10 around here, which is -- you know -- reasonable
11 doubt, he's way over here. He's at, like,
12 99.9999999999 percent. That's where he differs.

13 And he's not a medical examiner. So
14 that's like me telling you, oh -- you know -- that
15 patent. That won't work. That patent won't work.
16 And you've got a patent lawyer who is telling
17 you -- you know -- actually, it will work. This is
18 how it works. And I'm saying, well -- you know --
19 I've read some things about patents. I got it on
20 Wikipedia. And I know that that won't work. I
21 know 99.9999 percent that those patents don't work
22 that way. But you've got a patent lawyer saying,
23 actually, I disagree, Buddy. They do work that
24 way.

25 Okay. That's what we're talking about

1 here. But you know what. If you're uncomfortable
2 with saying that Dr. Dickson is wrong -- and I
3 understand that. You know, if you're uncomfortable
4 with my sort of tone and my kind of calling him
5 out -- which I am. I admit that. But if you're
6 uncomfortable with me sort of taking him to task
7 for talking -- doing research on Wikipedia and all
8 those things, which I am. I'll admit that to you
9 right now. I am calling him out for that. Okay?

10 I am calling him out for not testifying
11 in an area that he actually knows about. I am
12 calling him out for that. But if you're
13 uncomfortable with that -- and I understand because
14 he seemed like a nice guy. If you're uncomfortable
15 with that, that's okay. You don't have to agree
16 with me. You don't have to -- you guys -- you
17 folks can call him out if you want, but you don't
18 have to.

19 And the reason is -- this is not do you
20 believe Dickson or Paul? Okay. This is not a
21 50/50, you decide by 51 percent who you think is
22 more probably right. You don't have to do that.
23 You don't have to say, hey, you know what. At the
24 end of day, I think everything Mr. Li has said is a
25 little less likely than what the state said. And I

1 think Dr. Paul -- you know -- I think he's a nice
2 guy, but I think his testimony is a little less
3 likely than Dr. Dickson, a little less likely --
4 you know -- and so I'll believe Dr. Dickson by a
5 little more than Dr. Paul.

6 You don't have to call out Dr. Dickson
7 because you know what. It's the state's burden.
8 You have to believe beyond a reasonable doubt way
9 over here that Dr. Dickson is right with all of the
10 issues that I've pointed out to you and that way
11 over here that Dr. Paul is wrong. So it's not
12 50/50.

13 It's you have to decide that Dr. Paul
14 with all his experience and all his education and
15 the fact he works for the state and everything like
16 that -- you have to decide literally exactly what
17 the state said, that he literally has no
18 credibility at all, that there's not a real
19 possibility, because that's the reasonable doubt
20 instruction. You remember that.

21 There is a real possibility that Mr. Ray
22 is innocent, you must find him not guilty. Okay?
23 Real possibility. So you have to find that there
24 is not a real possibility that Dr. Paul might have
25 been telling you the truth. That's all you got to

1 find. You don't even have to say I don't believe
2 Dr. Dickson. You can say I believe him a lot. I
3 believe him all the way to here. I believe exactly
4 where I believe the medical examiners -- or medical
5 examiner, Dr. Lyon. I believe him right up to
6 here. You can do that, and then you don't have to
7 hurt his feelings or anything like that. You can
8 get right up to here. So that's reasonable doubt.

9 So my point to you -- and I appreciate
10 your attention. My point to you is that you have
11 to believe beyond a reasonable doubt that Dr. Paul,
12 the medical examiner, board certified medical
13 examiner, board certified emergency room doctor,
14 trained at a Harvard University associated
15 hospital, state employee who works with the police
16 and prosecutors in New Mexico.

17 Can you imagine how bad his job is going
18 to be if he's just a -- you know -- a liar? I
19 mean, he's done. Whose job it is, whose job it is,
20 to determine cause and manner of death, who has
21 actually -- and you heard him -- reviewed sweat
22 lodge cases as part of his research for this case,
23 including one that happened at his -- in his
24 jurisdiction where the patient, by the way, had an
25 elevated temperature of 103 degrees and was

1 severely dehydrated when they did her autopsy,
2 because that's actually things you look for in heat
3 stroke.

4 You actually do need to look for these
5 things, whatever the state would have you believe.
6 Who is -- specializes in lung disease and pulmonary
7 edema. So he knows the difference between
8 swallowing your own spit, which is not how you die
9 of organophosphate poisoning, and having paralysis
10 of the diaphragm, which is how you die -- one of
11 the ways you die of organophosphate poisoning. You
12 stop breathing. That's what happens. Okay? It's
13 not that you choke on your own spit. You have all
14 kinds of things that stop you from that.

15 And who has never, ever, ever testified
16 in a defense case ever. You have to believe beyond
17 a reasonable doubt that when he concludes, as he
18 did under oath to you, that it was not heat stroke
19 and that there was a toxicity, just like all these
20 other doctors suspected, just like that tape you
21 heard, just like the medical examiners that the
22 state has employed and are paid for by your tax
23 dollars, just like all the these folks cannot rule
24 out, you have to believe despite all of that beyond
25 a reasonable doubt that Dr. Paul all the way up to

1 here is just wrong. Despite all of that, Dr. Paul
2 is the one guy who is just flat out wrong.
3 And there is not a real possibility --
4 we're not even talking a probability, just a
5 possibility that he's right. Ladies and gentlemen,
6 you cannot do that. You can't do that. That would
7 be in violation of your oath. Because given
8 everything you've seen and heard here, you can't do
9 that in good conscience.

10 And if you find that there is a
11 reasonable possibility that Mr. Ray did not cause
12 these deaths, that some other thing did, that some
13 unknown toxin did, then you must acquit him. You
14 must acquit him. And that's what the law is.

15 Your Honor, would this be --

16 THE COURT: Yes. Thank you, Mr. Li.

17 We're going to take the evening recess,
18 then, ladies and gentlemen. Again, please remember
19 all aspects of the admonition. As I've been
20 reminding you, you cannot communicate among
21 yourselves. Even at this point you have to keep
22 following that part of it, all the other parts too,
23 about avoiding any possible exposure to the case in
24 any fashion. So, again, follow all aspects of the
25 admonition, of course.

1 And then we will resume at the regular
2 time. Be assembled at 9:15 tomorrow.
3 I'm going to ask the parties to remain a
4 moment.

5 Thank you.

6 (Proceedings continued outside presence
7 of jury.)

8 THE COURT: The record will show that the jury
9 has left the courtroom.

10 One thing I want to remind you, the
11 attorneys, please make sure that any instructions
12 you submitted to me that are to be filed that they
13 have been filed. Verify that with the clerk. I
14 want to make sure that that's been done, the
15 various versions.

16 I mean, the ones that I've read, I think
17 all of those have gone in with a notation. But
18 sometimes people have given me ones that they've
19 been altered or not given. So verify that. That's
20 happened today.

21 And the only other thing I want to
22 mention -- and Ms. Moreton is here. I wanted to
23 indicate that I've apparently been receiving some
24 ex parte communications, which I don't review. My
25 JA screens those out from me. And I think that

1 there might have been some mentioning by my JA to
2 Ms. Moreton about that and the possibility of a
3 juror being somewhere in the vicinity.

4 So from what my understanding is, there
5 wasn't any anything that likely happened. But
6 again, I always bring those things up. So if the
7 attorneys want to talk to Ms. Moreton or
8 Ms. Troxell, please go ahead.

9 I don't see the need of making any
10 further record. But if you want to talk to them
11 about that, please do. And then a further record
12 or further action could be taken. From what I hear
13 from my JA, it doesn't seem to be that kind of
14 situation at all.

15 So anything else before we recess then?

16 Ms. Polk.

17 MS. POLK: Your Honor, could I just ask Mr. Li
18 how much longer he anticipates being.

19 THE COURT: Mr. Li, I wanted to discuss that
20 too.

21 MR. LI: I understand. I would say perhaps an
22 hour or perhaps --

23 THE COURT: I can tell you how much time you
24 have spent.

25 MR. LI: I might be -- Your Honor, I need to

1 be -- in all candor, it may be even two hours.

2 THE COURT: I'd like to give you an idea.
3 You've also been keeping track yourself.

4 With what I'd indicated originally, you
5 had 170 minutes of closing, so there would be 70
6 minutes, in any event. There is going to be equal
7 time provided. And I think that's a good guideline
8 that you provided. So I'm asking you to really
9 look at that. As I mentioned, the case was
10 lengthy, the trial. And I understand that closing
11 arguments would be longer.

12 Ms. Polk, anything else?

13 MS. POLK: No, Your Honor. Thank you.

14 THE COURT: Mr. Li?

15 MR. LI: No, Your Honor. Thank you.

16 THE COURT: We'll be in recess.

17 Thank you.

18 (The proceedings concluded.)
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1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss: REPORTER'S CERTIFICATE

3

4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 8th day of July, 2011.

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MINA G. HUNT, AZ CR No 50619
CA CSR No 8335

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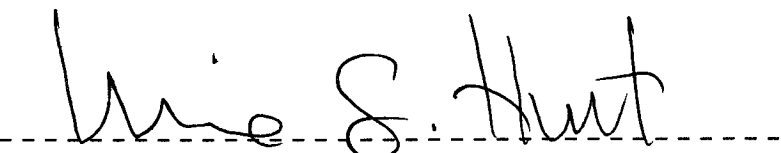
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16 In witness whereof, I have affixed my
17 signature this 8th day of July, 2011.

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24 MINA G. HUNT, AZ CR No. 50619
25 CA CSR No. 8335